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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,

vs.

CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

APPELLEE'S BRIEF AND ARGUMENT

John A. Reed, William Chamberlain and Ralph Maclean,
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X. C. Nady and Ralph H. Munro,
Attorneys for Appellees.

STATEMENT OF FACT

Ordinance 192, in the form of a contract, was proposed, passed, submitted to, and received the affirmative vote of a majority of, the electors of the city of Fairfield, Iowa, and was accepted in writing by the appellant's assignors. (Record pages 20, 21, 41.)

It contained the following:

"The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

'On bills rendered for monthly consumption, the rates shall be as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubit feet; * * * etc.

'The rates which grantee is entitled to charge for services from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa." (Record pages 17, 18).

Appellant alleges:

"That Ordinance No. 192 of said City of Fairfield fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubic feet," etc. (Record page 5).

The defendants answered:

"That the said City of Fairfield, Iowa, or the City Council of said City is not now, and has not since the granting of said Franchise, attempted to establish the rate contended for, but are only attempting to enforce the contract entered into by the City and the said Dows, Smith and Reed, and their successors, the Iowa Electric Company, the plaintiff herein." (Record page 21).

An amended and substituted answer was filed in which defendants plead:

> "That the City Council of the said City of Fairfield, Iowa, is .... now establishing, and has not since the granting of said franchise and its acceptance, established, or attempted to establish any rate other than as provided and agreed upon in said franchise."

In this paragraph of the answer there was a typographical omission of the word "not," at the point indicated by the dash. (Record page 41).

The omission was not noticed by appellees until after the printed record was filed in this court.

Appellant charged the rates agreed upon from about March 1, 1917, until April 30, 1918. Appellant alleged that it had placed its plant in good operating condition and operated it carefully and economically, but this question was not litigated, and was not in fact true. (Record page 45).

Appellant presented an application to the city council for higher rates, which application was not granted, and about May 1, 1918, appellant undertook to raise the rates regardless of the provisions of the franchise or the consent of the city, and notified the consumers that "the company will bill for all gas service furnished after May 1st, at $1.60 per thousand cubic feet." (Record pages 7, 8).

The city council thereupon determined to start proceedings against the plaintiff to restrain it from raising the gas rates. Plaintiff then brought this action to restrain and enjoin the city, the mayor and members of the city council, as officers of said city and as representative citizens and taxpayers of said city and customers of the plaintiff, from

interfering with the collection by plaintiff of the proposed increase in rates. (Record page 12).

Defendants, in addition to what is above stated, pleaded in answer to plaintiff's Bill of Complaint:

> "That because of the foregoing facts the rates fixed in said franchise for a period of three years from the date of the acceptance thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates therein fixed until the expiration of said three year period, unless sooner changed by the City Council under and by virtue of its power to fix and regulate rates as provided by statute." (Record pages 41, 42).

This contention was sustained by the United States District Court in a written opinion filed March 24th, 1919, and reported in 256 Fed. 929. (Record page 30-36).

Since the decision, on August 15th, 1919, there was filed an application by the plaintiff to Continue the Restraining Order, or Temporary Injunction, which had been made authorizing 45 per cent. of the existing rate to be collected and deposited in the First National Bank of Fairfield, Iowa, as a Court fund, pending appeal. (Record pages 23, 46, 50).

This order was made and thereafter until July 1st, 1920, this additional 45 per cent. was so collected and deposited, amounting to the sum of $14,892.62.

On July 1st, on application of the Iowa Electric Company, the city council increased the rates to $2.25 per thousand cubic feet upon promise of better service, but the service since that time has been wholly inefficient.

DIVISION ONE

CITIES OF IOWA HAVE THE POWER TO GRANT OR REFUSE TO INDIVIDUALS OR PRIVATE CORPORATIONS THE AUTHORITY TO ERECT AND MAINTAIN WATER, GAS, AND ELECTRIC WORKS OR PLANTS FOR A TERM OF NOT MORE THAN TWENTY-FIVE YEARS SUBJECT TO THE APPROVAL OF A MAJORITY OF THE ELECTORS OF SUCH CITY.

Code Section 720.

(a) This provision of the statute authorized the city to exact any conditions it saw fit, not unlawful in themselves or contrary to public policy.

Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 345.

Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

19 Ruing Case Law, p. 1153, par. 427.

Southern Pac. Company vs. City of Portland, 227 U. S. 559, 33 Sup. Ct. Rep. 308.

Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188.

Indianapolis vs. Gas Consumer's Trust Co., 140 Ind. 197, 49 Am. St. Rep. 183.
State vs. Corrigan Consol. St. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361.
Muncie Natural Gas Co. vs. Muncie, 60 L. R. A. 822.
Westfield Gas & Mill Co. vs. Mendenhall, 142 Ind. 538.
Logansport & W. V. Gas Co. vs. Peru, 89 Fed. 185.
2 Dillin Munic. Corp. 4th Ed. par. 705.
Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234.
Missouri Pac. R. Co. vs. Kansas ex rel Taylor, 30 Sup. Ct. 330.

(b) The city, by means of such conditions, may impose obligations upon the utility company which it would have no power or authority to impose under its general charter powers.

Southern Pac. Ry. Co. vs. Portland, 227 U. S. 559.
Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253.
19 Ruling Case Law 427.
Kadish vs. Garden City Bldg. Assn., 151 Ill. 253, 42 Am. St. Rep. 256.
Cook Co. vs. Chicago, 158 Ill. 526.
Fulton vs. Northern Illinois College, 158 Ill. 333.
Chas. Simon's Sons Co. vs. Maryland T. & T. Co., (Md.) 63 L. R. A. 727.

(c) If the utility company accepts the grant it is bound by the conditions and is estopped to question their validity.

Smittle vs. Haag, 140 Iowa, 492.
Thompson vs. Mitchell, 133 Iowa, 527.
Daniels vs. Tearney, 102 U. S. 421, 26 L. Ed. 187.
Ferguson vs. Landram, 5 Bush. 230, 35 Am. Dec. 624.
Van Hook vs. Whitlock, 26 Wend., 43, 37 Am. Dec. 246.
Gano vs. Minneapolis, etc., R. R. Co., 114 Iowa, 713, 87 N. W. 714, 89 Am. St. Rep. 393.
Dow vs. Electric Co., 68 N. H. 59, 31 Atl. 22.
Pitkin vs. City of Springfield, 112 Mass. 509.
Deverson vs. Eastern R. R. Co., 58 N. H. 129.
Dodge vs. Stickney, 61 N. H. 607.
People vs. Murray, 5 Hill, 468.
Electric Co. vs. Dow, 166 U. S. 489, 17 Sup. Ct. Rep. 645.
Grand Rapids & Ind. Ry. Co. vs. Osborn, 24 Sup. Ct. Rep. 310; 12 Corpus Juris 769.
Farnsworth vs. Boro Oil & Gas Co., (N. Y.) 109 N. E. 860.
Pond vs. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cases, 504.

(d) The utility company cannot retain the benefits of the franchise and repudiate the burdens on plea of ultra vires, or want of authority on the part of the city to make the condition.

Chicago Genl. Ry. Co. vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188.
Kadish vs. Garden City, etc., Bldg. Ass'n. 151 Ill. 531, 42 Am. St. Rep. 256.
Cook County vs. Chicago, 158 Ill. 526.
Fulton vs. Northern Ill. College, 158 Ill. 333.
City of Balfast vs. Belfast Water Co., 98 Atl. 738.
Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167.
Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172.
Doane vs. Lake Street, etc., R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265.
Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079.
State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116.
Gibbs vs. Craig, 58 N. J. Law 661, 33 Atl. 1052.
Flower vs. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149.
Dyer vs. Walker, 40 Pa. 157.
2 Pars. on Contracts, 961.
Joy vs. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.
Fidelity Insurance Co. vs. Bank, 127 Iowa, 591.

(c) The municipality only can complain of lack of authority to contract.

Williamson vs. Carlton, 51 Me. 449.
Wellington et al., Petr's, 16 Pick. (Mass.) 87, 26 Am. Dec. 631.
Hingham, etc. Corp. vs. County of Norfolk, 6 Allen (Mass.) 353.

Red River, etc., Bank vs. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994.

(f) Ultra Vires transactions are utterly void when made the basis of suit to charge a bank with liability but when the bank seeks to enforce advantages obtained through such transactions, even though they are impliedly forbidden, they are valid unless questioned by the government.

Bank vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.
Gold Mining Co. vs. Bank, 96 U. S. 640, 24 L. Ed. 648.
Bank vs. Mathews, 98 U. S. 621, 25 L. Ed. 188.
Reynolds vs. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733.
Bank vs. Gadsen, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258.

DIVISION TWO

ORDINANCE 192 WAS IN THE NATURE OF A CONTRACT AND THE RATES THEREIN SPECIFIED CONSTITUTED ONE OF THE CONDITIONS UPON WHICH THE FRANCHISE WAS GRANTED.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Co. vs. City of Creston, 101 Iowa, 687.
Ind. Dist. vs. Le Mars Light & Water Co., 131 Iowa, 14.
Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 982.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.

Knoxville Water Co. vs. Knoxville, 189 U. S. 434.

City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

Chicago General Railway Co. vs. Chicago, 176 Ill. 253.

Cook County vs. Chicago, 158 Ill. 526.

Fulton vs. Northern Illinois College, 158 Ill. 333.

Columbus Ry., Power & Light Co. vs. City of Columbus, 39 Sup. Ct. Rep. 349.

City of Belfast vs. Belfast Water Co., 98 Atl. 738.

City of Tipton vs. Tipton Light & Heating Co., 176 Iowa, 224.

Abbott on Munic. Corp. Vol. 3, Sec. 915.

Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.

City of Indianapolis vs. Consumer's Gas Trust Co., 140 Ind. 107.

Western Paving & Supply Co. vs. Citizen's St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462.

Manitowoc vs. Manitowoc, etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.

City of Woodburn vs. Public Service Co., 161 Pac. 391.

Trenton & Mercer County Traction Corp. vs. Trenton, 101 Atl. 562.

State ex rel Tacoma R. & P. Co. vs. Wash. Pub. Service Com., 172 Pac. 890.

Sausalito vs. Marin Water & Power Co., P. U. R. 1916A, 244.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.

Columbus Ry., Power & Light Co. vs. City of Columbus, 253 Fed. 499.

City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

(a) Conditions in franchise ordinances fixing rates are not unlawful or against public policy.

Farnsworth vs. Boro Oil & Gas Co., 109 N. E. 860.

Dusenberry vs. N. Y. & C. T. Co., 46 App. Div. 267, 61 N. Y. Supp. 420.

Simons Sons Co. vs. Md. Tel. & T. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

Mere T. & D. Co. vs. Collins R. R. Co. (C. C.) 101 Fed. 347.

Bismarck Gas Co. vs. District Court, 170 N. W. 878.

DIVISION THREE

THE POWER TO REGULATE RATES IS GOVERNMENTAL.

(a) The Gas company had no power to fix the rate, and the Court had no power to fix the rate either directly, or indirectly, by restraining the city, the members of the city

council, and the consumers, from interfering with the collection of a rate fixed by the Gas company.

Pocatello vs. Murray, 21 Idaho, 180, 120 Pac. 812.
Emporia Telephone Co. vs. Public Utilities Commission, (Kansas, 1916), 154 Pac. 262.
Interstate Comm. Commission vs. Railway Co., 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243.

(b) The Iowa statute, Sec. 725, Code Sup. 1913, authorizes the city council to fix the rate; **but, in the absence of its exercise or of any contract,** the company furnishing the service may fix and demand reasonable compensation for such service. Here the rate is defined by the terms of the franchise granted, which is in the nature of a contract between the company and the municipality.

Iowa R. & L. Company vs. Jones Auto Co., 182 Iowa, 982.

(c) The authority granted to a municipal corporation to contract for a water or gas supply includes the power to agree upon the rates to be charged for a definite period, notwithstanding the power to regulate rates is recognized as legislative or governmental.

Benwood vs. Public Service Com. W. Va. Sup. Ct. 83 S. E. 295, 1915—C, L. R. A. 261, note on page 267.

Bessemer vs. Bessemer City Waterworks, 152 Ala. 391, 44 So. 663.

Birmingham Waterworks Co. vs. Birmingham, 211 Fed. 497, affirmed in 213 Fed. 450.

Vicksburg vs. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. Ed. 1155, 27 Sup. Ct. Rep. 762.

Ashland vs. Wheeler, 88 Wis. 607, 60 N. W. 818.

Omaha Water Co. vs. Omaha, 12 L. R. A. (N. S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cases, 614, 207 U. S. 584, 52 L. Ed. 351, 28 Sup. Ct. Rep. 262.

State vs. Railway, 159 Iowa, 259, 281.

State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, 1915—C, L. R. A. 287.

Turtle Creek Borough vs. Pennsylvania Water Co., 90 Atl. 199.

(d) The law giving municipalities the power to regulate and fix rates was in force at the time of the passage of the ordinance and its acceptance, and hence became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178, 137 S. W. 1093.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.

Tampa Waterworks Co. vs. Tampa, 199 U. S. 241, 50 L. Ed. 170, 26 Sup. Ct. Rap. 23, 45 Fla. 600.

Lackey vs. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622.

Ellis vs. Tampa Waterworks Co., 56 Fla. 858, 19 L. R. A. (N. S.) 183, 47 So. 358.

Pocatello vs. Murray, 21 Idaho, 180, 120 Pac. 812.

Iowa Railway & Light Company vs. Jones Auto Company, 182 Iowa, 982.

(e) The power of the city and the voters thereof to fix a maximum rate, or a rate stated for a reasonable period of time, subject to the power of the city council to regulate and fix other rates, has long been recognized by the Iowa Supreme Court, the Supreme Court of the United States, and other courts generally, regardless of the number of inhabitants of the city.

Waterworks Company vs. City of Creston, 101 Iowa, 687.

Des Moines vs. Waterworks Co. 95 Iowa, 348.

Independent School District of Le Mars, Iowa, vs. Le Mars Light & Water Co., 131 Iowa, 14.

State vs. Railway, 159 Iowa, 259.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. Rep. 389, 56 L. Ed. 594.

Benwood vs. Public Service Commission, L. R. A. 1915 C, page 261.

Pinney & Boyle Co. vs. Los Angeles Gas & E. Corp. 141 Pac. 620, L. R. A. 1915 C, pag 282.

State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915 C page 287.

(f) The City by the ordinance did not undertake to surrender any right or power it had.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Knoxville Water Company vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. E. 887.

Portland R. Light & P. Co. vs. Portland, 201 Fed. 119, followed in Portland, R. Light & P. Co. vs. Portland, 210 Fed. 667.

Waterworks Co. vs. City of Creston, 101 Iowa, 687.

Indianapois vs. Indianapolis, etc. Co., 66 Ind. 396.

Indianapolis vs. Consumer's Gas Trust Co., 140 Ind. 107, 49 Am. St. Rep. 183.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S. 650.

Beach on Public Corporation, secs. 713, 990, 1229, 1230.

Des Moines vs. Waterworks Co., 95 Iowa, 348, 357.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. 490.

Des Moines vs. Welsbach St. Lighting Co., 188 Fed. 906.

(g) If the contract be doubtful, such doubt should be resolved in favor of the city and against the utility company.

Peterson vs. Tacoma Ry. etc. Co., 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.
Des Moines Waterworks Co. vs. Des Moines, 95 Iowa, 348.
Illinois Cent. R. Co. vs. Chicago, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. Ed. 622.
People vs. Detroit United Ry., 139 Am. St. Rep. 582, 162 Mich 460, 125 N. W. 700, 127 N. W. 748.
Township of West Bloomfield vs. Detroit U. Ry., 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258.
Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. 493.
Long Island Water-Supply Co. vs. City of Brooklyn, 17 Sup. Ct. Rep. 718.

DIVISION FOUR

THE POWER TO CONTRACT AND THE POWER TO REGULATE AS TO RATES ARE NOT INCONSISTENT, AND BOTH MAY EXIST AT THE SAME TIME IN THE SAME CITY COUNCIL, OR OTHER LEGISLATIVE BODY.

Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345.

(a) City councilmen are not disqualified because of their interest.

Home Tel. & T. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 60.

(b) There is a marked distinction between the power to regulate and the power to contract.

City of Tipton vs. Tipton Light & Heating Co. 176 Iowa, 224.
City of Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.
Manitowoc vs. Manitowoc, etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.
Omaha Water Co. vs. City of Omaha, 147 Fed. 1.
City of Woodburn vs. Public Service Co., 161 Pac. 391.
Salt Lake City vs. Utah Light & Traction Co., 173 Pac. 556.
Trenton & Mercer County Traction Corp. vs. City of Trenton, 101 Atl. 562.
State ex rel Tacoma R. & P. Co. vs. Washington Public Service Commission, 172 Pac. 890.
Sausalito vs. Marin Water & Power Co., P. U. R. 1916A, 244.

DIVISION FIVE

APPELLANT CONCEDES, AND THE DECISIONS OF THE IOWA SUPREME COURT HOLD, WITHOUT QUALIFICATION, THAT PRIOR TO THE PASSAGE OF CHAPTER 16 OF THE 22ND GEN. ASSEM. ALL CITIES OF IOWA HAD POWER TO FIX RATES BY CONTRACT.

Appellant's Argument page 46.

(a) Chap. 16, 22nd G. A., however did **not** have the effect of taking away from cities of over 7000 the right they had theretofore possessed of contracting for rates, but provided, in express terms, for **further and additional** powers.

McClain's Annotated Code Sec. 725.
City of Council Bluffs vs. Waterman, 86 Iowa, 688.
Phillips vs. City of Council Bluffs, 63 Iowa, 576.
Lambe vs. McCormick, 116 Iowa, 169.
U. S. vs. Freeman, 3 How. 556, 11 L. Ed. 724.
State vs. Gerhardt, 145 Ind. 439, 33 L. R. A. 313.
Sherman vs. City of Des Moines, 100 Iowa, 88.
City of Dubuque vs. Harrison, 34 Iowa, 163.
Ament vs. Humphrey, 3 Greene (Iowa) 255.
State vs. Iowa Tel. Co., 175 Iowa, 607.
Diver vs. Savings Bank, 126 Iowa, 691.

(b) The Supreme Court of Iowa has held that the language used in the Code of 1897 was, in effect, a substantial re-enactment of the provisions of Chap. 16, 22nd G. A.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 173 N. W. 270.

(c) Intention on the part of the municipality to abridge its power to regulate rates cannot be implied from the language used in the ordinance in question.

Knoxville Waler Company vs. Knoxville, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531.

Georgia R. & Bkg. Co. vs. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 Sup. Ct. Rep. 47.

Ragan vs Aiken, 9 Lea 609, 42 Am. Rep. 684.

Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581.

Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178, 137 S. W. 1093.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 233 U. S. 655.

Waterworks Company vs. City of Creston, 101 Iowa, 687.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. Rep. 493.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. Rep. 490.

State vs. Public Service Co., 172 Pac. 890.

(d) Appellant's Bill of Complaint does not allege any attempt to fix unchangeable rates, but alleges that the Ordinance No. 192, fixes maximum rates.

Appellant's Printed Record, Page 5.

DIVISION SIX

UNDER THE CONSTITUTION OF THE UNITED STATES THE JUDICIAL POWER OF THE GENERAL GOVERNMENT IS VESTED IN THE SUPREME COURT, AND SUCH INFERIOR COURTS AS CONGRESS SHALL FROM TIME TO TIME ORDAIN AND ESTABLISH. EVERY COURT OF THE UNITED STATES, THEREFORE, MUST DERIVE

ITS JURISDICTION AND JUDICIAL AUTHORITY FROM THE CONSTITUTION OR THE LAWS OF THE UNITED STATES.

Federal Statutes Annotated 2nd Ed. Vol. 11, page 98.

(a) Jurisdiction must affirmatively appear.

Turner vs. Bank of North America, (1799) 4 Dall. 11, 1 U. S. (1. ed.) 718.
Vol. 11, page 100, 2nd Ed. Fed. Stat. Ann.

(b) A remedy by Certiorari or Mandamus would be the only available remedy, if any exists in the courts.

Collingwood Sewerage Co. vs. Borough of Collingwood, (New Jersey, 1918), 102 Atl. 901.
State vs. Lewis, (Indiana, 1918), 120 N. E. 129.

(c) The remedy, however, is political and not judicial.

Benwood vs. Public Service Com., 1915C, L. R. A. 261.
State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861. L. R. A. 1915C, 287.
Manitowoc vs. Manitowoc & U. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 345.
City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920.

DIVISION SEVEN

THE RULE THAT THE UNITED STATES COURTS WILL FOLLOW DECISIONS OF THE STATE COURTS CONSTRUING THEIR OWN STATUTES HAS NO APPLICATION TO THIS CASE.

(a) Where the state courts hold that a contract right exists, instead of denying it, there is reason for following the state courts ruling.

Birmingham Waterworks Co. vs. City of Birmingham, 211 Fed. 497.

(b) This rule, however, is limited to such construction given to similar charters at the time the contract was made.

Birmingham Waterworks Co. vs. Birmingham, 211 Fed. 497.
Vicksburg vs. Vicksburg Water Co., 206 U. S. 496-509, 27 Sup. Ct. 762, 766, 51 L. Ed. 1155.
Raymond vs. Terrebonne, 28 Fed. 773.

(c) The decisions of the Supreme Court of Iowa, of the federal courts generally, and of the United States Supreme Court, prior to the making of the contract in question, sustain such contract right.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Co. vs. City of Creston, 101 Iowa, 687.

Iowa Ry. & Light Co. vs. Jones Auto Co., 182 Iowa, 982.

City of Tipton vs. Tipton Light & H. Co., 176 Iowa, 224.

Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. Rep. 389, 56 L. Ed. 594.

Muscatine Lighting Co. vs. Muscatine, 256 Fed. 929.

Smittle vs. Haag, 140 Iowa, 492.

Thompson vs. Mitchell, 133 Iowa, 527.

ARGUMENT

As a leading inducement to secure the approval of the members of the city council, the voters at the special election, and the consumers of gas, Dows, Smith and Reed, the promoters who were seeking the franchise in question, proposed and agreed that for a period of three years, the rates to be charged for gas should be $1.375 per thousand cubic feet, subject to the power of the city council to "regulate and fix" other rates, under the power retained by the city under Sec. 725 of the Code.

In presenting to the city council their application for increased rates Mr. John A. Reed conceded that there had been very little increase in the cost of production since the acceptance of the franchise by the company, but insisted that the company had considered such increased cost, which was apparent at the time of the acceptance of the franchise, as only temporary, and that they had now found it to be more prolonged than had been expected. Later, in presenting the matter in court, Mr. Reed, sug-

gested that he had regarded the clause as to rates as legally ineffective, and believed from the beginning, that he could secure the franchise on the strength of such an inducement and then legally disregard the rate clauses, and still hold the franchise and all rights and privileges going with it, without being in any manner affected by such clauses.

His position in this Court now is that he and his company, the Iowa Electric Company, can retain, use and enjoy all of the rights, privileges and things of value secured by the franchise, and repudiate the condition as to rates upon which the franchise was secured. And that his company had the right to raise the rate from $1.375 to $1.60 per thousand cubic feet, and an order of this Court to restrain the city, the city council, the consumers, tax payers, and patrons of the company, from interfering with the collection of such proposed increase in rates.

No court, so far as we are able to ascertain, has ever made any such decision.

Appellant concedes, and states in argument, that after Chapter 16 of the Acts of the 22nd Gen. Assem. made the provisions of Sections 471, 472, 474 and 475 apply to gas works, which Act became effective in 1888, and thereafter and up to July 4, 1888, all municipal corporations possessed the power to contract as to rates for service to both public and private consumers. (Arg. page 46).

Appellant then says:

> "The same legislature passed Chapter 16 of the Acts of the 22nd G. A., which became

> effective July 4, 1888, which conferred powers on cities of the first and second class having more than 7000 inhabitants, and special charter cities to 'regulate the price of gas, electric light, water rates, and to regulate and fix the charges for water meters, etc.,' but the section also provided that the power conferred to 'regulate' should not be construed to authorize the passage of an ordinance on the making of any contract whereby the above powers are abridged."

Appellant then argues that the effect of Chapter 16 of the 22nd G. A. was to take away from cities of the first and second class having over 7000 inhabitants, the right they had theretofore possessed of contracting for rates, and to substitute therefor a right to "regulate." (See Appellant's argument, page 47).

We are unable to see how such a construction can be placed upon the Act in question without doing violence to the English language.

The original statute, Sec. 473, above referred to, reads as follows:

> "When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corpor-

ation building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

Chapter 16 G. A. Par. 1, McClain's Annotated Code, Sec. 725, reads as follows:

"Additional Powers. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state **in addition to the powers now granted**, shall have the **further and additional powers** conferred by this act, as follows, towit: They shall have power to establish, build and regulate market houses, * * *; to regulate the price of gas, electric light, water rates * * *. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

The same language will be again found in Sec. 725 of McClain's Supplement of 1892, the material part of which reads:

"All cities * * * having over seven thousand inhabitants * * * **in addition** to the pow-

ers now granted, shall have the **further and additional powers** conferred by this act, as follows, to-wit; * * * to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters, and any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged."

Section 720 of the Code of 1897 provides:

"They shall have power to purchase, establish, erect, maintain and operate * * * gas works * * * and lease or sell the same. They **may** also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, etc."

Section 725 provides:

"They shall have power * * * to regulate and fix the rents or rates of water, gas and electric light or power; * * * and these powers shall not be abridged by ordinance, resolution or contract."

Section 725, as it appears in the Supplement of 1913, does not differ in these particulars.

Hence it will appear that the history of the statutory provisions with reference to the granting

of franchises, the regulation and fixing of rates, and the prohibition of any manner of abridgment of the powers to regulate and fix, not only disprove the assertion that the legislature intended to deprive cities of the power to contract, but conclusively prove that the powers to regulate and fix rates should be **further and additional powers** than those then existing.

In Waterworks Co. vs. City of Creston, 101 Iowa, 687 reading from page 698, Par. V, the Supreme Court of Iowa, in 1897, said:

> "Appellant's next contention is that the contract is void, in that it attempts to exclude future regulation."

Section 1, Chapter 16, Acts Twenty-second General Assembly, confers upon cities power to regulate water rates, and to regulate and fix the charges for water meters, etc., and provides:

> "This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract whereby the above powers are abridged."

The ordinance grants to appellee the right to charge and collect, during the continuance of the privilege, from consumers, the rates specified, "or other rates that may be established by the grantees and approved by said council." By this ordinance the city council established the rates therein specified, and have not since established any other or different rates. It is not alleged nor shown that these rates are unreasonable, and they are, there-

fore, authorized, legal, and binding until other reasonable rates are fixed. That the city council may at any time, when these rates are found to be unreasonable, fix rates that are reasonable, we think cannot, in view of said chapter 16, well be doubted. It is insisted that because of the provision in the contract as to rates the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain this contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has. Surely, every equitable consideration is against such result. What we have said disposes of appellant's contention that the rates, being for twenty-five years, are unreasonable."

In the foregoing case the Supreme Court of Iowa, in an opinion filed April 10, 1897, reviewed the history of the statute, which appellant now seeks to convince this Court would disclose an intent of the Legislature to eliminate the power to contract, and arrives at the opposite conclusion, in the following language:

> "In the Revision of 1860 (Section 1059), power was given to incorporated cities and towns to erect waterworks, and to charge consumers a sufficient amount to defray the expenses of conducting and repairing the waterworks, and for the creation of a sinking fund for the liquidation of the debt created in erecting the works. We do not find that, prior to

the enactment of said chapter 78, any other provision was made for providing or paying for water supply by cities and towns. Said chapter was, at least so far as we are now called upon to consider it, incorporated into the present Code, and we will refer to it as found in McClain's Annotated Code. In addition to the power conferred in section 615, "to protect the property of the incorporation and its inhabitants," power is given in section 639, to erect water, gas, and electric light works, when approved by a majority vote of the electors. Section 640 provides that "they shall have power to construct or authorize the construction of such works without their limits." Section 641 provides that when the right to build and create such works is granted to private individuals or incorporated companies, "such cities and towns are authorized and empowered to enter into a contract with the individual or company constructing such works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

The Ordinance, No. 128, was enacted by the defendant city, and accepted by the plaintiff company, in June, 1891.

In Des Moines vs. Waterworks Co., 95 Iowa, 348, the Supreme Court of Iowa, in an opinion filed October 1, 1895, said:

"Now, it may be that these propositions

are not conclusive as to the rights of the company, because they are in the nature of offers to compromise. But they are in exact line with the thought that the company has no right, by contract, ordinance, or resolution, to resist a lawful adjustment and regulation of the rates. The fact that the original ordinance granted an exclusive right to furnish water for forty years, as we have seen, is not a material question in the case. It will be time enough for the company to call upon the courts to protect it from an abridgment of a supposed contract or constitutional right when an attempt to deprive it of such right is made. Its contract with the city was that the rates should not be one unalterable standard for forty years. If such a contract had been made, it might admit of very serious doubt whether it could be sustained. By the census of 1870 the population of the city of Des Moines was about twelve thousand, in 1880 it was twenty-two thousand, and it is now a city of about sixty thousand inhabitants. A contract binding the city to the initial rate for forty years from 1871, and up to the year 1911, might, and probably would, be held to be so unconscionable and unreasonable that it could not be enforced."

And on page 362 of the same opinion the court said:

"It will be observed, from what we have stated, that we concur in these propositions of counsel, and we must decline to determine questions which the cases do not present; and we are

thereby relieved of the examination and citation of a large number of adjudged cases upon the scope of the powers of incorporated cities and towns, in reference to the reasonableness of contracts of this character. There is no doubt of the power of the state to regulate the compensation to be paid to corporations in the exercise of a public service or employment, in the absence of any schedule of prices fixed by an arrangement in the nature of a contract."

In Ind. Dist. vs. LeMars Light & Water Co., 131 Iowa, 14, the Supreme Court of Iowa, in an opinion filed June 7, 1906, said:

"The city of LæMars, a municipal corporation of the second class. On the 1st of Oct., 1888, the city passed an ordinance entitled, 'An ordinance to provide for supply of water for the inhabitants of Le Mars, Iowa, for domestic use, for fire protection, and for other purposes.' The ordinance gave to J. M. Dunn, his heirs and assigns, the exclusive right for the term of 25 years to use the streets, alleys, and public grounds of the city for the purpose of erecting and maintaining a system of waterworks. The ordinance provided for the acceptance of its conditions in writing within 30 days after its passage, and that when accepted, it should constitute a contract between the city and Dunn, his heirs, and assigns. The conditions of the ordinance were accepted in writing by Dunn within the time required thereby. * * * Section 15 of the ordinance is as follows, so far as it is material to the present inquiry: 'The

following shall be the maximum water rates to be charged annually by said grantee, his heirs or assigns, for the use of water until changed as hereinafter provided.' Following this is a long schedule. * * * Churches and schools were designated therein as free. At the time the ordinance was passed the plaintiff owned and used three school buildings which have ever since been furnished free water for drinking, cleaning, and heating purposes by Dunn and his successors. * * * * Under section 417 of the Code of 1873, the city of LeMars had the power to erect waterworks itself, or to authorize the erection of the same by a person or corporation. Section 473 provided: (Then follows a quotation already quoted in this argument, page 24.)

This statute gave the city of LeMars the right to contract not only for water for municipal purposes, but for the rate which should be charged other consumers thereof. The express power thus granted was to be exercised by the city in the interests and for the benefit of the inhabitants of the city who might wish to become patrons of a water plant erected by an individual or a corporation, and included within its purview all consumers, whether such consumers might be individuals or corporations, secular or religious. That the ordinance and its acceptance by Dunn constituted a contract binding him and the city, as stated therein, cannot be successfully questioned."

And on page 19 of the same opinion the Court said:

"It is further contended that there is no privity of contract between the parties and therefore that the plaintiff has no right to maintain this action. If this be true, it is plain that no inhabitant of the city may maintain an action to compel a private water company to comply with its contract with the city to furnish the inhabitants thereof water for domestic purposes, and we do not think that such a rule can possibly obtain. The statute granting the city power to authorize private persons or corporations to construct waterworks and giving the city power to fix the rates by contract, impliedly, at least, makes every consumer of water thereunder privy to the contract to such an extent as to enable him to enforce his rights under the contract."

And on page 20 of the same opinion the Court said:

"The constitutional questions raised by the answer have been argued with much earnestness but we are unable to see how they affect this case. If the city were now attempting to establish the rate contended for by the appellant, there would be force in the appellee's several points, but such is not the present case. The contract entered into by the city and Dunn was one they both might lawfully make, and having made it, both parties and their privies are bound thereby. The plaintiff asks nothing more than the enforcement of a legal contract, and this we think it entitled to on both reason and authority."

In Iowa Railway & Light Company vs. Jones Auto Company, 182 Iowa, 982, one of Mr. Reed's own cases, decided by the Supreme Court of Iowa, October 25, 1917, the Supreme Court of Iowa, referring to Section 725 of the Code Supplement, 1913, said:

> "This statute authorizes the city council to fix the compensation for services to be rendered; but, in the absence of its exercise **or of any contract**, the company furnishing the service may fix and demand reasonable compensation for such service. Here the rate is defined by the terms of the franchise granted, which is in the nature of a contract between the company and the municipality; and the vital issue to be determined is whether, in agreeing that it was not to exceed the compensation stated, meter rents were actually or impliedly excluded."

And on page 990 of the same opinion the Court said:

> "The franchise granted by said ordinance was subject to the power reserved in the city council 'to regulate and fix the rent or rate for * * * heat,' and this might not be 'abridged by ordinance, resolution or contract.' Or, as is often said, the statute necessarily is read into the franchise and forms a part of it. Appellant expresses some doubt as to the meaning of the clause last quoted. Its manifest purpose is to forestall any attempt, by ordinance or resolution of the city, or through any contract, to permanently or for any specified

time fix the compensation for services rendered or material furnished. Whatever may have been the ordinances of the city in granting a franchise, or independent thereof, or resolution of the city council, or contract with the city or private parties, the power is continued in the city council to regulate and fix the rates of compensation thereafter to be exacted. The power is a continuing one, and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The granting of such a franchise is by the city council, even though its approval by the electors of the municipality is essential to its validity. Section 776. **And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council.**"

The foregoing was recognized as the law of Iowa by its Supreme Court in February, 1918, and now appellant contends that because the city council did not deem it **expedient or necessary to raise the rates** specified in the franchise ordinance, that appellant's property is being confiscated by the city. Appellant lays great stress upon what was said in Town of Woodward vs. Iowa Railway & Light Co., 178 N. W. 549. An examination of that case will show that it was a case wherein it was sought to specifically enforce performance of the contract, and not a case wherein the gas company attempted to restrain the city, the members of the council, and the consumers of gas, from interfering with the collection of such a rate as the gas company proposed to collect regardless of the action or

lack of action on the part of the city council as the council may have deemed expedient or necessary.

We will admit that there is language used in that opinion as follows:

> "By chapter 16, Acts 22nd G. A., this right of contract by the city council was taken away from cities having a population of 7000 or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases."

We submit, however, that this statement is entirely unsupported by the history of, and the acts, and statutes, in question, and the decisions of the Iowa Supreme Court, and those of the Federal Courts. And we also submit that by the express terms of the statutes in question, the power to regulate and fix rates was an **additional power**, "in addition to the powers now granted, they shall have the further and additional powers conferred by this act," being the exact language used by the chapter referred to.

Nowhere can be found any language capable of being construed, or misconstrued, into a prohibition against fixing rates by contract, in the first instance. Indeed the statute, Section 725, recognizes three methods, but prohibits any **abridgment** of the powers to regulate and fix other rates when, as said in Jones Auto Co. case, "subsequent adjustment * * *

be deemed expedient or necessary by the city council."

In State vs. Public Service Commission, 172 Pac. 890, reading from the last paragraph of the opinion, on page 894, the Supreme Court of Washington said:

> "It is doubtless true that the Public Service Commission Law is remedial legislation, and should be given a liberal construction for the purpose of carrying out the will of the Legislature, as was pointed out in State ex rel R. R. Com. vs. Great N. R. Co., 68 Wash. 257, 123 Pac. 8; but the rule authorizing a liberal construction does not mean that the court shall write conditions or provisos into the statute where the Legislature has placed none, or write out of the act a section which the Legislature has placed there, when the various sections are not in irreconcilable conflict and may be harmonized."

In Ottumwa Railway & Light Co. vs. City of Ottumwa, 173 N. W. 270, Justice Salinger, on page 273, says:

> "The only remaining question is whether the illustration holds good in fact — whether such a statute as has been illustrated with has been in fact passed. We think that section 725 of the Code of 1897 is such a statute. That part of it which enacts that the power to regulate and fix rents and rates 'shall not be abridged by ordinance, resolution or contract' was, in effect, in existence as early as July 4,

1888, when chapter 16 of the 22nd G. A. became effective.' It is true chapter 16 does not contain said prohibition of section 725 in haec verba. But its language is, in effect, that of the prohibition found in the later statute. And on the revision of the Code it was evidently thought that the words in question found in section 725 were a substantial re-enactment of the provisions of said chapter 16, and, as said, we think that that is so."

Much stress is laid upon the duty of this Court to follow decisions of the state courts construing their own statutes. From a review of the decisions of the Supreme Court of Iowa, and of the statutes in question, and their history, we think this Court will find nothing in them requiring any such construction as contended for by appellant.

Justice Salinger, in the Ottumwa Railway & Light case, reading from 173 N. W. on page 272, says:

"It (The Supreme Court of the United States) has always held that if, in reason, there was a doubt whether statute authority to make such a contract had been conferred, and the highest court of the state has held that the power had or had not been conferred, it would, while reserving its right to independent decision, be strongly inclined to follow such pronouncement of such state court."

In Douglas vs. Kentucky, 168 U. S. 488, this Court said:

"The Federal Courts will lean towards an

agreement of views with the state courts if the question seems to them balanced with doubt."

It would seem, from a casual reading of some dicta in some opinions written by some members of the Iowa Supreme Court since the decision of Judge Wade in this cause, that an attempt was being made to forestall the decision of this Court in this case and other like cases, but we submit that the previous decisions of the Iowa Supreme Court and the statutes themselves do not leave any such matter of local state importance, so balanced with doubt. Neither is there any such clear present decision of the state court, as to preclude this court from deciding this cause upon the law generally as it may determine it to be.

In Birmingham Waterworks Co. vs. City of Birmingham, 211 Fed. reading from page 500, we find this statement:

> "Where state legislation is assailed in the Federal courts, as impairing the obligation of contract in violation of section 10, article 1 of the Constitution of the United States, the determination by the state courts that there is no conractual right to be impaired is not conclusive upon the federal courts. The federal courts determine for themselves whether contractual rights exist and are impaired by the subsequent legislation. A contrary rule would render this provision of the Constitution ineffectual, since it would be in the power of the state courts to render it inapplicable in any case by determination that no contract right existed to be impaired.

However, when the state courts' construction **upholds** the existence of contract rights, **instead of denying** them, no such reason exists for not following the state decisions. The charter power of a municipal corporation under the laws of the state creating it is a matter for the state courts to determine, and the federal courts will follow their construction unless it conflicts with proper enforcement of a right under the laws of the United States.

In the case of Vicksburg vs. Vicksburg Water Co., 206 U. S. 496-509, 27 Sup. Ct. 762, 766 (51 L. Ed. 1155), the Supreme Court of the United States said in a similar case to this one:

> 'In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight, and ordinarily followed. As this is a Mississippi contract, and the power was exercised under an act of the Legislature of that state, we naturally took to the decisions of the courts of that state, particularly to such as had given construction to similar charters **at the time the contract was made**, with a view to determining the extent of the power conferred.'

Under this principle, the Alabama decisions reflecting on the power of the city to enter into the contract of June 2, 1888, should be controlling, when they **upheld** the power of the city to make the contract."

This opinion was reviewed and approved by the Circuit Court of Appeals April 18, 1914, reported in 213 Fed. 450.

In City of Council Bluffs vs. Waterman, 86 Iowa, 688, reading from page 691, the Supreme Court of Iowa, said:

> "It is our duty to so construe these statutes as that all may stand and have effect, if possible, unless they are clearly in conflict, or the latter unmistakably or by express reference repeals the former."

In Phillips vs. City of Council Bluffs, 63 Iowa, 576, reading from page 578, the Supreme Court of Iowa, said:

> "But in 1876, the general assembly passed an act entitled 'An act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities.' See Miller's Code, pages 141-146. Sections 8, 9 and 10 of the statute are substantially the same as section 469 of the Code, except that the provision in relation to the payment or tender of the damages is omitted. Does this last statute repeal by implication section 469 of the Code, as to cities acting under special charters? There is no express repeal of any prior or existing statute. Why the latter was enacted while the former was in force is a problem we are unable to solve, unless the provision above quoted, as forming a portion of section 479 of the Code, was overlooked. Be this as it may, we think, as both statutes may be enforced, and there is no inconsistency in their provisions, that both should be permitted to stand. All that can be

said is that they are substantially the same, but that section 469 of the Code contains a provision that is not found in the last statute enacted."

In this connection we desire to call the Court's attention to the fact that in enacting chapter 16 of the 22nd G. A. the legislature expressly provided that the power to regulate and fix rates, should be a further and additional power, "in addition to the powers now granted." While in the Code of 1897 these particulars were not inserted in section 725 of the Code of 1897, which was a substantial re-enactment of section 725 of McClain's Code, which did contain these explanatory words.

We therefore contend that the Supreme Court of Iowa is not at liberty to, and cannot without doing violence to the English language, say that there is either any express or implied repeal of the power to fix rates by contract, which is admitted to have existed prior to the passage of Section 725 of the Code of 1897. Especially in view of the fact that by the express language of Section 725 of McClain's Code the powers therein granted were to be "further and additional powers," "in addition to the powers now granted."

In Diver vs. Savings Bank, 126 Iowa, 691, Judge Deemer, writing the opinion of the Court, said: (Reading from page 696):

"There was no express repeal of any section of the Code, and, if there be a repeal, it must be held to result from implication. Such repeals are not favored in law; and when two statutes cover, in whole or in part, the same

matter, and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of a court, if possible, to give effect to both. It will not be presumed that the legislature intended a repeal of a prior statute by a later one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

In Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655, this Court said:

"The supposed contract arises from a term in the ordinance under which the plaintiff was granted a renewal of its franchise in 1896. By Sec. 3, 'In consideration of the privileges herein granted to said company it shall furnish to the inhabitants of said city gas for lighting at a price not to exceed $1.80 per thousand feet, and 20 cents per thousand cubic feet discount if consumers pay on or before the 10th of each month after consumption,' etc. It is admitted that under the laws of Iowa the rate could be changed by the city, but it is argued that the quoted words import a contract that it shall not be changed to such an extent as to make impossible the offer of a discount for prompt payment,—that being the cheapest and most efficient way of collecting the price of the gas. The state court assumed that there was no contract in the case, and in discussing what it treated as the sole question, whether the plain-

tiff would be deprived of a fair compensation for its services, pointed out that the company could secure payment by requiring a deposit in advance or by making other reasonable rules.

"We are of the opinion that there was no contract on the part of the city that the price should be kept high enough to allow a discount for prompt payment. The general power reserved to regulate rates was limited only by the 14th Amendment. The words relied upon by the plaintiff express its promise in consideration of the privileges granted—not a promise by the city. Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 437, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531. It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates. That power, it was expressly provided by the Iowa statute, was not to be abridged by ordinance, resolution, or contract. Code of 1897, Sec. 725, 22d G. A. (1888) Chapter 16."

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, last above cited, this Court said:

"The Water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to 'charge such prices for the same

as may be agreed upon between said company and said parties.' This incorporation was under a general act which provides as follows: 'And this (act) is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.' Acts of 1877, Chap. 104, Sec. 2. In the same year, 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, the city gave the company exclusive privileges for thirty years and agreed to make certain payments, etc., and it was mutually agreed, among other things, that, after fifteen years, the city council have the right to purchase the works at a price to be fixed by appraisers if not agreed upon. The contract contained three distinct parts: First, the promises of the company; next, those of the city; and last, the mutual undertakings. In the first part the company undertook as follows: 'Said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons,' subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

"After the contract was made the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated

with one of the other concerns, which was a corporation. The towns, on their side, were made a part of Knoxville; and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case, and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cuts down the rates which the company had been charging and asserts its right to charge.

"The trouble at the bottom of the company's case is that the supposed contract on which it is founded does not exist. If such a contract had been intended, it was far too important to be left to implication. In form the words are words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia R. & Bkg. Co. vs. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Ragan vs. Aiken, 9 Lea, 609, 42 Am. Rep. 684. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed.

Rockport Water Co. vs. Rockport, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the 14th Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim.

"We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit vs. Detroit Citizens' R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it had tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the com-

pany and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law. * * * *

"Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. * * * The contracts recognize the possibility of change, as the agreement is to pay for the water in accordance with the rates 'now or hereafter in force.'"

In Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581, the Court said:

"It is alleged in the complaint that the plaintiff is selling natural gas in Ft. Smith under Ordinance No. 634, passed December 21, 1903, and that said ordinance provides that the price charged for natural gas should not exceed the sum of $1 per thousand cubic feet. It is contended by the plaintiff that this provision for a maximum rate of $1, together with certain other provisions in the ordinance requiring the grantee of the franchise, and his successors, to furnish gas free to certain public buildings, constitutes a contract which prevents the city from making a lower maximum

than $1. This contention is not good for three reasons:

(1) "The city by the ordinance did not undertake to surrender any right or power it had. On the other hand, the grantee of the franchise in accepting the ordinance undertook to sell natural gas at a price not to exceed one dollar per thousand cubic feet, regardless of conditions. With reference to fixing the price of gas the ordinance was a limitation on the grantee of the franchise, and not upon the city. Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887.

(2) "The law giving municipalities the power to fix rates was in force at the time of the passage of the ordinance in December, 1903. It therefore became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise. Arkadelphia Electric Light Co. vs. Arkadelphia, 99 Ark. 178-186, 137 S. W. 1093.

(3) "The city could not by contract divest itself of the power conferred upon it by the legislature. Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655."

The action in the foregoing case was an application for a temporary restraining order to restrain the city of Ft. Smith and its mayor, police judge, and city attorney from enforcing Ordinance No. 1053, passed by the council of the city of Ft. Smith on the 16th day of December, 1912, in which the maximum price at which natural gas may be sold to consumers in said city is fixed at 25 cents per thousand cubic feet. This ordinance was not

the franchise ordinance, was never accepted by the gas company, was a legislative act of the city council purely, and was confiscatory in fact, if the rate as so reduced was not compensatory.

The distinction between such a case and the one at bar is well pointed out in the recent case of City of Moorhead vs. Union Light, Heat & Power Co., 255 Fed. 920, in which the District Court of the United States for the District of Minnesota, in an opinion filed October 26, 1918, said:

> "It is easy to confuse this case with the cases which have usually been brought before courts by utility companies. Such companies usually come into court upon the following state of facts: They have received a franchise from the city, fixing the rate for their service. At a subsequent date the city in the exercise of its police power reduces those rates, and the company then asserts that the new rates are confiscatory; that is, so low as not to yield a reasonable profit upon the value of the property devoted to the service. As against all such reductions, the company is protected by the Fourteenth Amendment of the Constitution against rates being made so low as not to pay a reasonable profit. Such, however, is not the present case. Here there has been no reduction by the city of the franchise rates. It simply stands upon its contract and asks protection against the rates being raised by the company. The party who is changing the franchise rates now is, not the city, but the utility, and the city is only asking the court to compel the company to perform its contract and furnish gas at the

rates for which the company has agreed to be bound.

"It is conceded in argument that the rule in the federal courts in actions at law is that a party is bound by his contract, though performance results in loss. This is settled by the Court of Appeals of this circuit in the recent case of Berg vs. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648. From a careful review of the authorities, Judge Sanborn there states that in some of the state courts a rule has been developed that, when conditions arise of such a character that the court can say that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will excuse a violation of the contract. He concludes, however, as follows: 'But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.'

"He cites many federal authorities in support of the strict rule. Among them are Dermott vs. Jones, 2 Wall. 1, 17 L. Ed. 762; The Harriman, 9 Wall. 161, 172, 173, 19 L. Ed. 629; Jones vs. United States, 96 U. S. 24, 29, 24 L. Ed. 644; Chicago, Etc., Ry. Co. vs. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625.

"Conceding this to be the rule at law, counsel for defendants insist that the rule in equity is different, and that a court of equity will not specifically enforce a contract when a change in the situation has occurred of such a character that the parties at the time of mak-

ing the contract did not have it in contemplation. Controlling decisions of the federal courts, however, are also fatal to this contention. The question has been directly passed upon, and contracts much more inequitable than the one here involved were enforced in the following cases: Marble Co. vs. Ripley, 10 Wall. 339, 19 L. Ed. 955; Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900, 36 L. Ed. 776; Guffey vs. Smith, 237 U. S. 101, 115, 35 Sup. Ct. 526, 59 L. Ed. 856. These cases all decide that in determining whether equitable relief should be granted with respect to a contract the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair and free from fraud, mistake, or imposition, parties must be left free to make their contracts, and it is the duty of courts to enforce them as made. The same doctrine has been applied to contracts between municipalities and public utility companies. Logansport, etc., Gas Co. vs. Peru (C. C.) 89 Fed. 185; Muncie Natural Gas Co. vs. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Westfield Gas & Mining Co. vs. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Pond on Public Utilities, Secs. 431, 432.

"The contract between plaintiff and defendant is for a comparatively short term. The conditions which cause the hardship are not permanent, and are certainly not greater than those which frequently arise in contracts between private corporations and individuals. In

the case of In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319, Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts, held that contracts between public utilities companies and corporations for a brief term, so as to give both parties peace and an established status, were reasonable, and when so made should be enforced by the courts."

Again in the same opinion Judge Amidon says:

"It is finally urged that the franchise is not mandatory but permissive, and that the company has a right at any time to withdraw from performance when performance will entail an actual loss. There are numerous decisions which have held that street railway companies may withdraw their service from a limited section under the circumstances named. My attention has not been called to any case authorizing a public utility company to withdraw from supplying an entire city with a commodity like gas or electricity. I shall not attempt to determine at this time whether defendant possesses such a right. * * The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when

they were unreasonably low just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the state of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the legislature, and will not justify courts in assuming legislative powers."

In the foregoing case the situation was practically the same as in the case at bar. On the 6th day of May, 1912, an ordinance granting the defendant a franchise for the purpose of distributing gas for the term of ten years, was adopted by a majority of the voters of the city. It was accepted in writing on August 22d. Section 6 of this ordinance fixes the maximum price of gas at not to exceed $1.80 per thousand cubic feet for illuminating, and $1.45 for fuel purposes. Defendant has since been supplying gas to the city and its inhabitants under this franchise at the rates agreed upon. Aug. 22, 1918, defendant served upon the city of Moorhead written notice that the rates for gas for all purposes from and after September 1st would be $2 per thousand feet. The only material difference between the Moorhead case and the case at bar is that in that case the action was brought by the city to restrain the violation of the ordinance, and in the case at bar the action was brought by the utility company to restrain the city, the members of the city council, and the consumers and patrons, from interfering with the collection of the utility company's self-imposed raise in rates. Thus making the case at

bar a stronger case against the utility company, in that they are not simply seeking to avoid the performance of the ordinance contract, but they are seeking to hold what they desire of the benefits of the ordinance contract, and repudiate only the condition upon which they secured the privileges obtained under the ordinance.

If the utility company in the case at bar were only seeking to avoid specific performance of the ordinance contract, and were willing to treat it as void, the City of Fairfield, the members of the city council, and the consumers of gas, would be perfectly willing to accede to such a solution of the matter. In fact they would be pleased to treat the contract as forfeited, which we believe they would have a right to do unless the utility company complies with the conditions upon which they secured the franchise, the most important of which conditions was the matter of rates to be charged for the first three years, the increased cost of production being at that time already in effect. In fact the service rendered since the proposed increase in rates, and more especially after the expiration of the three-year period, when the city council did increase the rates to $2.25 per thousand cubic feet, on promise of the company to give better service, has been so poor and inefficient that the city and the patrons generally would be pleased to consider the franchise void as a whole, and make other provisions for their needs.

In Trustees of Saratoga Springs vs. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, we find this statement:

"We now reach, however, a provision of the statute which, in our judgment, necessarily renders it invalid. The statute enacts that 'the price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years, and, until after the expiration of such term, such commission, upon complaint as provided in this section, again fix the price of gas or electricity.' (Laws 1905, Chap. 737, Sec. 17). We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years. It is urged that the circumstances might so alter that before the expiration of three years a rate which was reasonable at the time it was established would become unreasonable. This is possible. Nevertheless, we think the legislature was justified in enacting some period of repose during which the rate should remain stable. In answer to this objection, we cannot do better than quote the reply made by Chief Justice Holmes to a similar objection in the Massachusetts case cited Re Janvrin. He said: 'But, supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or, if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed; and, if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong.'

"The real difficulty with the provision of the statute is that the rate fixed by the commission is to continue, not only for three years, but indefinitely thereafter, until fixed anew on complaint, as provided by the statute. But, by the terms of the statute, the only persons authorized to make complaint are certain municipal officers, or 100 or more customers or purchasers of gas or electricity. No opportunity or right is given to the corporation to apply, at the end of three years, or at any time thereafter, for a new adjustment of the rates. That right is limited solely to the municipal officials or consumers." . . . . . .

"It seems to us that this is a real case violating the inhibition of the 14th Amendment of the Federal Constitution."

Now, we quote the above for the reason that it is the doctrine there stated and illustrated that gives rise to appellant's contention of lack of mutuality.

If the city council were prohibited by statute from acting when appellant filed its application for a raise in rates, then this doctrine of equal protection of the laws" would be applicable. But it would be that clause of the Constitution that would be violated, and not a case of lack of mutuality of contract.

However, in the case at bar, the appellant had the same right to apply for a raise that the consumers had to apply to have the rates reduced, and the city council had the same power to raise rates as they had to reduce them.

The fact that the city council does not see fit to act, or in other words, does not deem it expedient or necessary to act at any particular time, does not inject into the matter any lack of mutuality, or violation of the equal protection clause of the Constitution.

It will be noted that the above case was a statute under consideration, and not a case where the objectional clause had been accepted and agreed to as one of the conditions upon which the franchise was received.

In State ex rel Webster vs. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C page 287, we find this statement:

> "The same question now confronting us was before the Supreme Court of Wisconsin. A city had granted permission to a railway company to run interurban cars over and along its streets. One of the conditions upon which the right was given was that the fare to be charged between the two cities should not exceed 10 cents for a single trip during the life of the franchise, which was thirty-five years. The franchise was accepted and acted upon. Thereafter the company to which the franchise had been assigned announced that the rate would be increased to fifteen cents. The city brought suit to prevent the increase in fares, and to compel the company to abide by its contract. The company set up as defenses that the city had no power to exact the condition that the ordinance, in so far as it related to interurban fares, was ultra vires; that the ordinance had been superseded and repealed by subse-

quent legislative action; that a fare of 10 cents was not compensatory; and that one of 15 cents was reasonable. The trial court found that a 10-cent fare was not compensatory, and that a 15-cent fare was reasonable, but that the company was bound by the terms of the ordinance, and enjoined it from raising the rate. The Supreme court reduced the questions involved to three: (1) Did the parties have the power to make a contract? (2) If so, to what extent is it binding and enforceable? (3) Had it been lawfully superseded or nullified? And now, adopting the language of the court: (1) 'That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law, and was not inimical to public policy, is clear enough. By so doing it could not forestall the state, and prevent it from exercising its governmental function regulating rates. But, until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory . . . . There was no law inhibiting the making of the contract involved, at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. . . . . .

"'We therefore hold that the parties were competent to make the contract entered into.' (2) It was held that no special authority had been conferred on the city to enter into the contract, and 'the contract remained valid be-

tween the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation.' "

Again, in the same opinion, we find this statement:

"The Railroad Commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made, the contract is in force. When it is made, the contract is superseded, **if the rate is changed.** The Commission has ample authority to proceed upon its own motion. The traction company, under subdivision 'e' of Sec. 12, has power to make the necessary complaint to compel investigation. This works no hardship on anyone. It may be, as the trial court found, that a 10-cent fare is unreasonable, and that a 15-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed, or that conditions have so changed that the road cannot be operated unless rates are increased, and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident con-

tract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it.' Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. The same principles are affirmed in Home Teleph. Co. vs. Los Angeles, 211 U. S. 271, 53 L. Ed. 181, 29 Sup. Ct. Rep. 50, and Dawson vs. Dawson Teleph. Co., 137 Ga. 62, 72 S. E. 508."

In Turtle Creek Borough vs. Pennsylvania Water Co., 90 Atl. 199, the court said:

"The main contention of appellants is that the ordinances created a contract relation between the parties, or at least between some of them, which limited for all time the rates to be charged by the water company. The ordinance of the borough of Turtle Creek, passed in 1895, contains the following provision: 'The rates charged by said company for water furnished for domestic purposes, by contract or by meter measurement, shall not exceed the rates charged for the same service by the city of Pittsburgh.' The ordinance does not contain any definite schedule of rates, nor is it limited as to time. Upon this question the learned court below, inter alia, said: 'On the contention that there exists a contract between the defendant and these several plaintiffs at the time the franchise was granted and permission given to enter into the borough, it is sufficient to say that where these contracts are for a definite period, they are binding; neither party

can receive the benefits therefrom and at its will repudiate the conditions entered into originally. But where the contracts have expired, or where they seem to be indeterminate, they are revocable on notice, under changed conditions.' To sustain this position the court cites the very recent case of McCollough-Dalzell Crucible Company vs. Philadelphia Co., 223 Pa. 336, 72 Atl. 633. The great weight of authority everywhere sustains the view of the court; indeed this view is based upon a very conservative statement of the law in such cases. In a number of jurisdictions it has been held that it is against public policy for private parties to enter into contracts with public service corporations fixing rates to be charged either for a definite or an indefinite term of years **so as to preclude judicial inquiry**, or investigation by other tribunals constituted for the purpose, into the question of the reasonableness of such rates. We have not gone so far in Pennsylvania, but have uniformly upheld contracts of this kind for fixed and definite periods."

We wish to call the Court's attention at this time to the fact that the appellant, Iowa Electric Company, does not, in its Bill of Complaint, claim that Ordinance 192 was intended to fix an unchangeable rate, but, the Bill uses the following language:

"Your orator further says that Ordinance No. 192 of said city of Fairfield, fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:" etc. (See Record Page 5).

In Smittle vs. Haag, 140 Iowa, 492, the Supreme Court of Iowa said:

> "Having clearly elected to his own benefit to treat the statute as constitutional, and the proceedings thereunder as valid, they will be deemed valid as to him, and the court will not inquire into the constitutionality of the statute. This point was ruled by this court in Thompson vs. Mitchell, 133 Iowa, 527."

In Railroad Company vs. Railway Company, 123 Iowa, 543, the Supreme Court of Iowa said:

> "A part of appellee's argument is devoted to a discussion of the constitutionality of the statute in question, but we do not deem it necessary to enter this field. It is conceded that the interlock is for the exclusive benefit of the old company, and is not a police regulation for the protection of the public. If this be true, it follows that the old company may or may not invoke the aid of the statute for the protection of its financial interests. If it does not demand the interlock, it must then obey the police statute, which requires trains to stop for grade crossings. Code, Sec. 2073. It may take its choice, but if it elects to require the crossing company to install an interlock, and thus invokes the protection of the statute, it cannot question the constitutionality of the terms upon which it may have such aid and protection. If the conditions imposed by the statute are not satisfactory, the company is not bound to accept them, or to put the stat-

ute in operation; but if it avails itself of the provisions of the statute which are beneficial to it, good conscience and fairness demand that it shall make no attack upon the conditions which are imposed by the statute, and which are an inseparable part of it. Daniels vs. Tearney, 102 U. S. 421 (26 L. Ed. 187); Ferguson vs. Landram, 5 Bush, 230 (96 Am. Dec. 350); Lee vs. Tillotson, 24 Wend., 337 (35 Am. Dec. 624); Van Hook vs. Whitlock, 26 Wend., 43 (37 Am. Dec. 246)."

In Gano vs. Minneapolis, etc. R. R. Co., 114 Iowa, 713, 87 N. W. 714, 89 Am. St. Rep. 393, Deemer, J. speaking for the Supreme Court of Iowa, said:

"Among other things, it is said the statute is not uniform in its operation; that it grants land owners immunities from costs that are imposed on railway companies; that it discriminates in favor of one class of litigants and against another; that it is violative of the fourteenth amendment of the federal constitution, in that it deprives railway companies of their property without due process of law, and denies to such companies the equal protection of the law."

And again in the same opinion:

"The ready answer to all this is that all corporations coming within the purview of the act are given like privileges. Given equal privileges, they may not complain of the burdens imposed, provided they are imposed on

all entitled to use the privilege. The act is not, in our judgment, vulnerable to any of the limitations of either the state or federal constitutions. But if it were, we are not prepared to hold that defendant may take advantage of its invalidity. In Dow vs. Electric Co., 68 N. H. 59, 31 Atl. 22, the Supreme Court of New Hampshire said: 'When a legislative grant of authority to exercise the power of eminent domain contains a condition that the grantee shall pay more than the value of the property taken under the power, the grantee accepting the grant and exercising the power cannot question the constitutionality of the condition. The defendants are authorized to flow plaintiff's land upon the condition, among others, that they pay the damage thereby done to him, and fifty per cent in addition. . . . . the statute is permissive. It confers a privilege which the defendants were at liberty to exercise or not, as they saw fit. By their exercise of the power conferred, flowing the plaintiff's land, and applying for assessment and damages, they are precluded from denying the validity of the condition. The question of its constitutionality under either the federal or state constitution is not open to them; Pitkin vs. City of Springfield, 112 Mass. 509; Deverson vs. Eastern R. R. Co., 58 N. H. 129, and cases cited; Dodge vs. Stickney, 61 N. H. 607; People vs. Murray, 5 Hill, 468. The defendant's objection that the statute is in conflict with both constitutions or either of them is overruled.' This case was afterwards appealed to the Supreme Court of the United States, and that tribunal said: 'We

agree with the Supreme Court of New Hampshire in thinking that the plaintiff in error, by availing himself of the power conferred by the statute and joining in a trial for the assessment of damages, is precluded from denying the validity of that provision which prescribes that fifty per cent shall be added to the amount of the verdict. The act confers a privilege which the plaintiff in error was at liberty to exercise or not, as it saw fit': See Electric Co. vs. Dow, 166 U. S. 489, 17 Sup. Ct. Rep. 645."

In Grand Rapids and Indiana Railway Company vs. Osborn, the Supreme Court of the United States, reading from page 314 of 24 Sup. Ct. Rep. said:

"Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of the existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. Daniels vs. Tearney, 102 U. S. 415, 26 L. Ed. 187. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated con-

ditions, and repudiate performance of the latter at will. Whether, if a condition in a statute is couched in ambiguous language, and is susceptible of two constructions, as is claimed in the case before us in respect to the basis upon which the gross receipts per mile of operated road was to be calculated, a construction should be adopted which will not render the condition repugnant to the Constitution of the United States, we need not determine. The statute in question, in its entirety, has been construed by the Supreme Court of Michigan, and held valid, and its decision as to the proper interpretation of the language of the act in respect to the mode of ascertaining the gross receipts per mile does not render the statute repugnant to the Constitution of the United States."

The foregoing case brings the question home to the case at bar. The language of the ordinance in question was not ambiguous or capable of but one construction. It plainly provided for specified rates to be charged for gas. And hence, having understandingly and voluntarily accepted the benefits of the franchise granted, Dows, Smith & Reed, and their assignees, the Iowa Electric Company, cannot repudiate the rate conditions and retain the beneficial conditions and privileges. It is estopped from repudiating the burdens.

In 12 Corpus Juris 769 we find the following:

"13. Estoppel or Waiver—a. In General. A person may, by his act, waive a right which

he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts right under it, may not question its constitutionality."

Certainly in the case at bar the Iowa Electric Company participated in proceedings under the Ordinance, 192, acted under it and in pursuance of the authority conferred by it, claimed the benefit of the ordinance to the detriment of others, and have asserted and are still asserting rights under it.

The position taken by the Iowa Electric Company seems to be that it can retain all of the rights, privileges, and benefits, obtained by the franchise ordinance and at the same time repudiate the vital condition upon which it secured such rights, privileges and benefits.

In fact the principal counsel for the plaintiff company, Mr. John A. Reed, was one of the original grantees of the franchise, and conducted the campaign personally in securing the passage of the ordinance in question, and its approval by the voters of the city of Fairfield, and knew of the increased cost of production at the time his company accepted the franchise. He afterwards explained to the city council that he at that time thought the

increased cost of production was only temporary, and claimed that it had lasted longer than he had anticipated. However, in presenting the matter to the federal court for an injunction he then claimed that he had always regarded to provision as to rates as illegal and ineffective, and believed he could repudiate that provision and get the rates raised without any danger of losing the franchise rights

We submit that to come into a court of equity with such a contention is most unreasonable, unfair, and unjust, and plaintiff cannot do so with clean hands.

This Court, and all courts, can readily appreciate the serious difficulties small cities would have in frequent contests as to whether or not the rates are producing a proper return on the capital invested in utility enterprises. All of the means of ascertaining the facts necessary to a proper solution of such a question are peculiarly within the knowledge and in the possession of the utility company, who, as in this case, give their property in for taxation purposes as being worth $50,000, and for the purpose fixing rates claim it to be worth $500,000. If the city is required to employ high priced engineers every time there is a fluctuation in the cost of production, and they cannot permit a rate to remain in the cost of production, and they cannot permit a rate to remain for so short a period as three years, when such time is fixed by the agreement of the utility company, as a condition upon which such utility company is permitted to use the streets, alleys, and public grounds of the city, then what becomes of the governmental power of the city council?

The Court will note from the provisions of the statutes of Iowa that under Section 720 cities "**may** also **grant** to individuals or private corporations the authority to erect and maintain such works or plants." No conditions are provided. No individual or corporation can compel such a grant. The provisions following, that they shall not be granted for more than twenty-five years, and that no such works or plants shall be authorized unless a majority of the legal electors vote in favor of the same, are a limitation upon the power to grant the franchise, and not a condition upon which any grant shall be made. In the nature of things this must be true, because such provisions are prohibitions against the grant, and not conditions. There could be no grant at all for more than twenty-five years, and none at all unless a majority of the voters favored the grant.

The express language of Section 725, which it is contended was intended by the legislature to take away an existing power to contract, or fix rates by contract, is permissive language. "They shall have power * * * and these **powers** shall not be **abridged.**"

This language is permissive language, it is language granting authority, and not language commanding or describing a duty. And, as appellant contends and we agree, it is language refering to a governmental function of the city council, to be exercised, as said by the Iowa Supreme Court in the Jones Auto case heretofore quoted from, "as this may be deemed expedient or necessary by the city council."

There is nothing in the language used in this statute, or any other statute, which either express-

ly, or by any reasonable construction impliedly, can be said to prohibit rates from being fixed by the agreement of the parties. In fact, the express language of the original act with reference to the grant of power to "regulate and fix rates," Chap. 16, 22d G. A., which Justice Salinger, in the Ottumwa Railway & Light Co. case, 173 N. W. on page 273, said, "on the revision of the Code it was evidently thought that the words in question found in section 725 were a substantial re-enactment of the provisions of said chapter 16, and as said we think that that is so," begins with the statement: "ADDITIONAL POWERS. 22d G. A., ch. 16, No. 1. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, towit:" Then follows the words in question. Nowhere in the act, or in any other act of the legislature, is there any language which, without absolute mis-construction, can be said to either expressly or by any manner of implication prohibit the fixing of rates by agreement.

There is a prohibition expressly stated in this statute, and that prohibition is that "these powers shall not be abridged by ordinance, resolution or contract." In the original chapter 16 referred to the language was: "This shall not be construed to authorize the passage of an ordinance or resolution **on** the making of any contract, whereby the above **powers** are **abridged**."

If appellant's contention that such provision prohibits the fixing of rates by **contract** be correct, then, by the same process of reasoning, it prohibits

the fixing of rates by **ordinance**, or by **resolution**. And if the city cannot fix rates by any of these methods, then in what manner can it fix rates?

The real truth of the matter is that there is no ambiguity in the language used. It means just what it says: The city can fix rates in any manner it sees fit, but in whatever manner rates are fixed, they shall be always open for re-adjustment, either up or down, "as this may be deemed expedient or necessary by the city council."

An analysis of the language used by the statute can lead to no other reasonable conclusion. The word "power," according to Webster's New International Dictionary, 1919, page 1687, means "the authority, capacity, or right." The word "abridged," according to the same reference, page 7, means "made shorter, lessened, diminished, curtailed, deprived of, or cut off."

And this Court, in construing the same kind of language, in the Knoxville Water Co. case, 189 U. S. 434, very clearly pointed out that the language used in the franchise ordinance, just as the language used in the ordinance in the case at bar, was in form "the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city."

It was not intended to tie the hands of the city council, or any succeeding council. It was merely intended, just as the language provides, that, "The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes" at the rates specified. "The rates which grantee is en-

titled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

There is nothing in this language, either expressly or impliedly, in any manner abridging or attempting to abridge the power of the city council to re-adjust or regulate the rates at any time. The language used is the words of the utility company alone, except the provision as to what the rates should be after three years, which evidently anticipated the establishment of a utility commission, and were perfectly consistent with the existence of the power to regulate and fix other rates when the city council might deem such regulation expedient or necessary. This language was used in the contract at a time when the statute expressly provided for such a retention of power, and prohibited its abridgment, of which statute both parties had knowledge, and which statute necessarily became a part of the contract. And as said by this Court in the Cedar Rapids Gas case, "it was subject to the power retained by the city to regulate rates."

In Shreveport Traction Co. vs. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345, on page 353 of 129 Am. St. Rep. on rehearing, the Supreme Court of Louisiana said:

> "The whole contention of the defendants is predicated on the proposition that the City of Shreveport has no power to fix rates by contract so as to prejudice the subsequent regulation of such rates by the city council.
>
> "The **power to fix rates by contract and the power to regulate rates may coexist in the**

same council or other legislative body. Thus the legislature has the undoubted power to regulate rates, but at the same time may grant to a railroad company the right to charge rates within certain limitations. Such a grant is a contract, and the rights thereby vested cannot be divested or impaired by subsequent legislation. * * *

"There is no express legislation in this state authorizing municipalities to establish rates for street railroads by contract or agreement. But such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of the streets."

In Muscatine Lighting Co. vs. City of Muscatine, 256 Fed. 929, Judge Wade, said:

"It is earnestly contended that the power to 'regulate and fix,' excludes the power of the city to contract. This may be granted, so far as a contract binding on the city is concerned; but I cannot agree that there is any limitation upon the power of the city to 'regulate and fix' by contract, as well as by ordinance or resolution. * * * * *

"In the State of Iowa, a city is given the power to grant franchises without limitation, except that such franchise shall not extend more than 25 years and that no exclusive franchise shall be granted. When this law was

passed, it was, and still is, the well-settled rule that—

"'When a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose.' 19 R. C. L. p. 1153, par. 427. * * *

"Section 725 confers the power to 'regulate and fix,' but it does not specify how such power shall be exercised, and under the rule above stated it has the power to use its own discretion as to how such power shall be exercised."

In Miller vs. City of Webster City, 94 Iowa, 162, 62 N. W. 648, Judge Deemer says:

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the powers granted, the time, manner, and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the courts, so long as they act within the scope of their authority. The discretion of a municipal corporation, within the sphere of its powers, is as wide as that possessed by the government of the state, subject, however, to the general rule that the ordinances must be reasonable. The

action of the city council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests. • • •

"Of course, any contract regulating rates must be in the nature of things, 'one-sided,' so far as the rate is concerned. This is true because the city reserves to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed must be reasonable. But I see no objections to a contract understandingly made which provides that the city (company) shall charge a maximum rate, which shall continue until such period as the same becomes unreasonable, and that at such time the city reserves the right to modify the same."

And in the same opinion Judge Wade says:

"It is of the highest importance that confidence of the people in the law, and especially in the sacredness of contracts, shall not be weakened. Every franchise and every power, under legislation, is construed most strongly against the grantee of a franchise. It is self-evident that to now hold that conditions relating to rates solemnly agreed to are without force would have a strong tendency to undermine the confidence of the public in the law, and would have a tendency to put utility companies under suspicion of repudiating their obligations.

"There is much force in the suggestion that regulation by contract should be permit-

ted, especially with reference to smaller towns, which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time, and I believe it would be in the interest of said communities to have a law permitting a contract binding both parties as to rates for reasonable periods of time, say three or five years. This would stabilize conditions for the utility company and the city or town, and avoid expensive and unpleasant controversies.

"It is, of course, important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the court (which for the trial of this issue I assume to be true) it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except in the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the court cannot relieve, as has been recently held in Columbus Co. vs. City of Columbus (D. C.) 253 Fed. 499, and other cases.

"But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the state of property without due process of law, and that they are denied the equal protection of the law. The Fourteenth Amendment to the Constitution of

the United States provides: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The state (and the municipality, which is an arm of the state) shall not 'deprive any person,' etc. At the foundation of these cases is the problem as to whether, upon the facts, the state or the municipality has deprived the utility companies of property without due process, or whether the state or municipality is denying the 'equal protection of its laws.'

"The courts are ever ready to enforce the provisions of the Constitution of the United States; but, in order to interfere with state or municipal legislation, it must appear that there is some affirmative act which constitutes the 'deprivation,' or the 'denial,' specified in article 14. When an ordinance is passed by a city council, under authority of the state, it is an act of the state, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the Constitution is sacred, and must under all circumstances be upheld.

"But has the state, or the municipality, in these cases, done any act which violates the Constitution, except in so far as such act has been consented to by the companies? It is fundamental that every individual constitutional right may be waived. * * *

"It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, the state has done no

act 'depriving' the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, which at the time is a reasonable rate, but which thereafter becomes confiscatory, without any act of the state, but simply as a result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the state is not violated by the state.

"This is serious business, restraining the sovereign act of a state. There is no constitutional guaranty of compensatory rates. So far as income and profits are concerned, the utility corporation stands exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money; but only when the state has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of the state, there is not that 'deprivation' or 'denial' which the Constitution forbids."

The foregoing opinion was written by Judge Wade and filed March 24th, 1915, in the Muscatine, Fort Madison, Mt. Pleasant, Chariton, and Fairfield cases. The Fairfield case being the one now appealed to this court. The opinion was made to ap-

ply to all of the several cases, and separate judgment entries were recorded in each case.

The jurisdiction of the Federal court, in which the Iowa Electric Company commenced this action, is based on the alleged violation of the constitutional provisions referred to.

Hence, unless some act was done by the city council of the City of Fairfield violative of some constitutional rights of the appellant, this court has no power to give any relief.

Let us analyze the position of the appellant. It asked for an injunction to restrain and enjoin the defendant city, the mayor and members of the city council, as officers of said city and as representative citizens and taxpayers of said city and customers of the plaintiff. Now suppose this Court should remand this case to the District Court, which should in turn grant such relief as asked. What would be the effect of such an order? The only effect that could be hoped for by the plaintiff would be to permit the Iowa Electric Company to themselves fix the rates to be charged consumers for gas which has already been furnished, regardless of the statutory provision that such power should be ever vested in the city council. It would be to establish a precedent authorizing the utility companies of Iowa to fix their own rates upon a failure of the city council to exercise the power vested in it by the legislature, which power appellant contends, and we concede, is purely a legislative power.

If the power given to the city council to regulate and fix rates is more than permissive. If it can be said to be a duty enforced upon the city council. And if it can be said that the city council can and should be forced to act affirmatively. How can such

a duty be enforced by the Federal Courts upon an allegation that the Fifth and Fourteenth Amendments of the Constitution of the United States have been violated?

No case has ever come to our attention holding that the legislative action of a state legislature, or city council, can be compelled by **any court**, much less by a Federal court under a jurisdictional allegation of violation of the due process or equal protection clauses of the federal constitution.

Even if this Court should be of the opinion, therefore, that some remedy ought to be applied to the situation complained of, unless there has been a violation of some constitutional right of the plaintiff company by the defendants, this Court is without power to apply such remedy, even if it were able to ascertain and point out such remedy.

If any remedy exists it must be to compel the city council to take affirmative action to regulate rates. Such a remedy would be by Mandamus in the State Courts.

But, in order to admit of such a remedy, we would have to contradict the statement of appellant that the rate regulating function is purely a legislative function, which contention we are perfectly satisfied with, and do not desire to oppose.

This feature of the case is well pointed out in State vs. Lewis. (Ind. 1918- 120 N. E. 129)

There the Supreme Court of Indiana said:

> "In our opinion the petition in the case at bar presented a state of facts over which the commission had jurisdiction, and its refusal to consider the same was error. Our statute makes no provision for an appeal from such

order, nor does the law afford the relator an adequate and specific remedy. This being true, a common-law writ of mandamus will issue to the commission, requiring it to take jurisdiction of the petition. Public Service Commission vs. State ex rel., 184 Ind. 273, 111 N. E. 10; Flournoy vs. City of Jeffersonville, 17 Ind. 169, 174, 79 Am. Dec. 468; Crane vs. Champ, 12 Conn. 464."

See also State vs. Public Service Commission, (Wash. 1918) 172 Pac. 890.

In Chicago General Railway Company vs. Chicago, 176 Ill. 253, 68 Am. St. Rep. 188, the Supreme Court of Illinois said:

"If, in the exercise of its sound discretion, the city council shall determine that the best interests of the public do not require the imposition of any conditions whatever, it may grant its license without qualification; but if, on the other hand, the public interest requires that the occupancy of particular streets, under peculiar conditions, demands that certain exactions shall be made of the company for the privileges conferred, then the city council has a right to so provide, and no constitutional right or privilege is interfered with. There is no general law of the State of Illinois, nor is there an ordinance of the city of Chicago, requiring all street railway companies to pay a mileage tax, but, as we have said, discretionary power is conferred by the legislature upon the city council to impose such a condition upon

giving its consent to any particular company to occupy its streets.

"We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract; Kadish vs. Garden City, etc., Bldg. Assn., 151 Ill. 531, 42 Am. St. Rep. 256; Cook County vs. Chicago, 158 Ill. 526; Fulton vs. Northern Illinois College, 158 Ill. 333.

"It is well settled in this state that while the granting of authority to occupy the public streets of a city for other than the ordinary purposes of a street is, in the first instance, a mere license, still, when that license is granted upon conditions, and the licensee has accepted the privilege and performed the conditions, it becomes a contract. Here it must be admitted that the defendant could only occupy the streets of the city with its tracks by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed

proper; and upon such conditions as they considered for the best interests of the public they granted the privilege and named the conditions. The defendant accepted, without qualification. It has availed itself of the benefits of the contract, and now seeks to repudiate the conditions. We are unable to see upon what principle, under the law of contracts, it can be allowed to do so."

In Farnsworth vs. Boro Oil & Gas Co., 109 N. E reading from page 861 we find this statement:

"It lived up to those conditions until November, 1911. In the summer of that year it applied to the town board to modify the permit so as to allow a charge of 30 cents per thousand cubic feet. The request was refused. The defendant then gave notice to the board and also to its consumers that, notwithstanding the conditions of the permit, it proposed to charge the increased rate. It has carried out its threat, and it now repudiates the conditions. It says that it did not need the permission of the town board. It says that what it should have obtained was the consent of the commissioner of highways. Because it requested and received the approval of the wrong officers, it says that its acceptance of the conditions must be held to count for nothing. It proposes to stay in the highways and charge whatever it pleases.

"I think the defendant is estopped to deny the binding force of its agreement. It applied to the town board for permission to lay its pipes in the highways of the town, and it re-

ceived the permission for which it prayed. The privilege may be one that the board was not competent to grant, but at least it believed itself competent, and the defendant shared that belief. There was a claim of right which the defendant extinguished for a price. The board asserted the power to regulate the use of the highway and to prevent the defendant's entry. The defendant yielded to the claim and purchased the coveted consent. It received the very benefit which it sought, the opportunity to lay its mains without molestation of its possession or question of its right. * * *

"Under such circumstances, the defendant will not be heard to say, while retaining possession of the highway, that the consent under which it entered was valueless and void."

In Chas. Simon's Sons Co. vs. Maryland T. & T. Co., (Md.) 63 L. R. A. reading from page 736 we find this statement:

"It cannot be here objected by the appellee that the regulation contained in the ordinance here in question as to rates of charge was not a reasonable one. The time to have urged such a consideration was before it accepted the ordinance and availed of the privileges it acquired thereunder. Whatever may have been the description of service the appellee was to furnish under ordinance 110, it would seem to be concluded as to the reasonableness of the rates of charge for that description of service by its own voluntary action."

In Bismarck Gas Company vs. District Court of Burleigh Co., the Supreme Court of North Dakota in an opinion filed January 9, 1919, reported in 170 Northwestern, page 878, said:

> "The plaintiff cites several cases holding that the courts have no jurisdiction to fix rates, but the question presented is not one of rate-fixing. The question is: May the Gas Company, or any party, accept a grant of a charter and avail itself of the benefits, and repudiate its conditions and obligations? May it accept from the city a valuable charter, fixing a maximum rate for gas, and then turn around and charge twice the maximum rate? And in such a case shall we say the city may not invoke the courts to forfeit the charter or to enforce its conditions? Assuredly it is a familiar rule of law that a grant upon conditions may be forfeited for a failure to observe its conditions.
>
> "But if the question presented be merely one of contract, then clearly it was competent for the city, in granting a franchise, to protect itself and the people of the city by contracting for maximum rates. That is in accordance with the well-reasoned decision by Judge Amidon in a Moorhead case. 255 Fed. 920. * * * * While Judge Amidon cites many authorities to sustain his decision, which is manifestly sound and in accordance with elementary principles, there is no reason for magnifying this case by any review of the authorities."

In Columbus Ry., Power & Light Co. vs. City of Columbus, decided by this Court April 14, 1919,

reported in 39 Sup. Ct. Rep. 349, this Court held that it had jurisdiction.

But the facts and cause of action in that case were not like those in the case at bar in this:

In that case the utility company attempted to surrender its franchise and discontinue the service and brought an action in the Federal court asking for an injunction restraining the city and officials and members of the city council from compelling the company, or attempting to do so, to operate its lines of street railway in the city of Columbus under the said ordinances, from in any way forcing, compelling, or attempting to compel, it to charge only the rates prescribed, etc.

The distinction between the two cases is apparent. In that case the utility company was not seeking to collect increased rates and collect rates of their own making, and enjoin the city authorities from interfering with such collection.

This Court held, in that case that the utility company was bound by the franchise rates, and that increased cost of operation not contemplated when the franchise ordinance was accepted was no defense, but jurisdiction of the court was based on the fact that affirmative action on the part of the dedendants was alleged. That defendants in that case were attempting to compel operation by the company at a loss. In the case at bar there is no such allegation and no fact upon which such an allegation could be based. The city authorities were not alleged to be doing anything other than attempting to **prevent** the Iowa Electric Company from collecting **increased** rates which the utility company was itself attempting to establish. No attempt was made, and no disposition suggested, to surrender

any benefits which the company held under the franchise ordinance.

In Emporia Telephone Company vs. Public Utilities Commission, 154 Pac. 262, the Supreme Court of Kansas, said:

> "3. A court has no jurisdiction to fix the rate to be charged by a utility for services to be rendered in the future, that being a legislative and not a judicial function. • • • The considerations that prevent a tribunal from fixing a rate to be charged in the future also forbid its accomplishing the same result by enjoining interference with a rate which it finds to have been unassailable in the past. Interstate Comm. Commission vs. Railway Co., 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243."

The same court further said:

> "But while a court is powerless to fix a rate for the future, it is authorized to prevent the enforcement of any **order of a board, or of any statute**, attempting to establish a noncompensatory rate."

Thus it appears that it is only in cases where the rate has been established in some manner without the assent or consent of the utility company, that the court can interfere by injunction to prevent enforcement of such order or statute on the ground that it is confiscatory in its effect.

In Missouri Pac. R. Co. vs. Kansas ex rel Taylor, 216 U. S. 262, 30 Sup. Ct. Rep. 330, reading from page 335, this Court said:

"But we do not think that the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that, on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory, because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in the Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission, supra." * * * *

And further on in the same opinion we find this statement:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, binding in favor of the corporation as to all rights conferred upon it, and devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road is then the question to be considered."

In City of Belfast vs. Belfast Water Co., 98 Atl. 738, the Supreme Court of Maine, in an opinion filed Sept. 28, 1916, said:

> "The city takes issue with the defendant on all these propositions. But it contends, also, that the defendant is now estopped from denying the validity of the contract which it adopted, and the benefits of which it has received. It is also urged that if the contract was ultra

vires, it was so only as to the city, and that the question of ultra vires, and the contention that the contract was against public policy, can be raised only by the municipality affected, and not by the other contracting party.

"It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not contra bonos mores, he should not be permitted to question the validity of it; that he is estopped. Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172; Doane vs. Lake Street, etc., R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079; State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116; Gibbs vs. Craig, 58 N. J. Law, 661, 33 Atl. 1052; Flower vs. Barnekoff, 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Dyer vs. Walker, 40 Pa. 157; 2 Pars. on Contracts, 961. And in Joy vs. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by the park commissioners, under an agreement with them, the court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law.

"Again, while it is true that in general the courts will refuse to enforce contracts contra bonos mores, there is good reason for saying

that the defense of ultra vires can be made only by the party whose acts, or the acts of whose agents, are claimed to be ultra vires. The ultra vires contract of a municipality is a legal wrong. The party that is wronged may be relieved. The other contracting party is not wronged in the eye of the law. And it would seem that it cannot seek to be relieved from a contract with which the other party is content. We have found no case where the other contracting party has been relieved, from a contract ultra vires a municipality. Ultra vires is properly a defensive proposition. It is a defense to an action seeking to enforce a contract. In every case, we think, it has been held the municipality that sought relief. It is well settled that courts will not declare a statute unconstitutional except at the instance of those whose rights are injuriously affected by the unconstitutional provision. They and they alone can do this. Courts will never, at the suit of one, pronounce a statute unconstitutional because it may impair the rights of others complaining. Williamson vs. Carlton, 51 Me. 449; Wellington et al., Pet'rs, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Hingham, etc., Corp. vs. County of Norfolk, 6 Allen (Mass.) 353; Red River, etc., Bank vs. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994. And if an unconstitutional provision cannot be attacked except by one whose constitutional rights have been invaded, much more it would seem for like reasons that a mere ultra vires contract could be attacked only by the party as to whom it is ultra vires. The decisions of the Federal

courts in national bank cases are illustrative. They point to the doctrine that the ultra vires transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, even though they are impliedly forbidden, they are valid unless questioned by the government. Bank vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; Gold Mining Co. vs. Bank, 96 U. S. 640, 24 L. Ed. 648; Bank vs. Mathews, 98 U. S. 621, 25 L. Ed. 188; Reynolds vs. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Bank vs. Gadsen, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258."

In City of Tipton vs. Tipton Light & Heating Company, 176 Iowa, 224, in an opinion filed May 10, 1916, the Supreme Court of Iowa said:

"As bearing upon this question, see 4 McQuillin on Municipal Corporations, Sec. 1729, in which it is said:

"'If the price of the supply is fixed by contract or otherwise, the company has no right to require consumers to pay meter rent in addition to the regular rate. So where the rates are fixed, they cannot be indirectly increased by charging a certain sum for taking readings of meters,' citing authority.

"See, also, Abbott on Municipal Corporations, ol. 3, Sec. 915, in which it is said:

"'The right of the licensee to fix the rates at which its commodities or services may be supplied and furnished, may be limited by con-

ditions in the license, grant or statutes. Or, again, by the universal rule which prevails that in the absence of express restrictions, rates charged must be reasonable. This latter principle is based upon the idea that persons or corporations carrying on the business of furnishing light, water, power or transportation, are to be regarded as engaged in a quasi public business . . . The state or its subordinate agencies, under these conditions, retains the right to limit charges to those which are reasonable, considering all the circumstances under which they are supplied.' * * *"

And again, in the same opinion, the Supreme Court of Iowa said: (Page 239).

"A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates."

Appellant now claims there is no power to contract as to rates, but the above language of the Supreme Court of Iowa recognizes the existence of such a power, as well as the power to limit the right of the licensee to fix rates, by conditions in the grant.

In City of Noblesville vs. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032, the Supreme Court of Indiana said:

"The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to consumers. But it was under

no compulsion to convey such right to any one. The subject of grant rested in contract, like any other matter. As the price of the right, the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. City of Indianapolis vs. Consumers' Gas Trust Co., 140 Ind. 107, 116; Western Paving & Suppy Co. vs. Citizens' St. R. Co., 128 Ind. 531, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462. That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract; and the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain."

Appellant argues that there is no specific authority given by the legislature to confer any power or authority upon municipalities to enter into lawful and binding contracts with public utility companies fixing gas, water, heating or electric rates, to be charged to private consumers.

This proposition, if conceded, operates against rather than in favor of appellant's contentions generally.

In Manitowoc vs. Manitowoc etc. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056, after a careful review of a large number of authorities, on page 1065 of 140 Am. St. Rep., the Supreme Court of Wisconsin says:

> "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that * * * * * the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

In the same opinion, reading on page 1065 of 140 Am. St. Rep. the Court said:

> "Statutes granting to cities the right to make long-time contracts binding on the public and fixing a rate to be charged by a public service corporation are not looked upon with favor, and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls."

A proper analysis of the above decision, and the large number of cases cited in support of it, in-

dicates that the law of interpretation and construction of statutes requires that a very clear expression of intention to exclude or suspend the power of regulation must appear in the language used before it can be held that there has been any intention to exclude or suspend such power.

Hence, if we adopt appellant's contention that the city council acted in a legislative capacity in passing Ordinance No. 192, we must find in the language of such ordinance very clear expression of an intention to exclude or suspend the power given by Section 725 to afterwards regulate and fix rates. No such language can be found in the ordinance in question, and we can safely say there was no intention on the part of the city to either abridge or suspend their statutory power to regulate rates. And we believe we can with equal candor say that there was never any intention on the part of the state legislature, that can be ascertained from any language ever used in any of its Acts, to prohibit cities from fixing rates in the franchise ordinance, which rates should continue in force until such time as the city council deemed it expedient or necessary to exercise their statutory power to regulate and fix other rates. And until such time, and no longer, the contract remained valid between the parties.

The only meritable argument that can be presented against what, in this one particular, would seem to be a one-sided agreement, is that the individual members of the city council, or at least some of them, are also consumers of gas and patrons of the appellant, and would in this respect be personally interested in the matter to be determined by them in exercising, or declining to exercise, the statutory power to regulate and fix other rates than

those fixed by the franchise contract. In other words, if the cost of production went down they would be likely to regulate rates downwards, but if the cost of production went up their personal interest might serve to deter them from acting at all.

It is this feature of the case that leads appellant to the contention that the contract is not mutual.

But, appellant is not supported by the decisions in this contention. If the city council had only the power to reduce rates there would be force in its contention. But such is not the case. The city council has the power not only to reduce, but it also has the same power to increase rates. It is only then the fact of their personal interest in the result that might make the law unfair in its actual administration that gives rise to the contention of the want of mutuality, and not anything inherent in the law or the contract of the parties.

This phase of the matter is directly passed upon by this Court in Home Telephone & Telegraph Company vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 50, in the following language:

> "The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this Court which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition. In this connection the appellant calls attention to the fact that, by the charter of the city, 25 per cent of the electors may recall a member of the council and require him again to stand

for election. Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the keener sense of dependence upon the will of the people which feature of his tenure of office brings to him will distort his judgment and sense of private justice. It would be conceivable, of course, that the members of the legislature themselves might be subject to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the Constitution and laws of the state."

Under a proper anaysis then there is no lack of mutuality in the franchise ordinance contract. The city at large, the consumers of gas, and patrons of the Iowa Electric Company, and the Iowa Electric Company itself, are all in the same category and situation at the time the ordinance contract is in effect. Either can petition the city council, that body in whom is vested the legislative function of regulating and fixing rates, to either raise or lower the rates fixed by the franchise ordinance at any time, and that legislative body has the power to regulate and fix other rates, either higher or lower.

There is then nothing in the law that would make the original franchise ordinance contract void for lack of mutuality. It is only the assumption that the **city council** will not regulate upwards when such regulation in equity and good conscience ought to be done, that gives rise to appellant's contention. Let us, for illustration, assume that the members of the city council are all disinterested, having no in-

terest in the result of the regulation prayed for, and not being dependent upon any of the consumers or patrons of the appellant for political support, and not being neighbors, friends, or even acquaintances, of either of the parties concerned. And also assume such members to be mentally and physically qualified to know and understand all of the matters proper to be considered, and that upon proper application being presented they had the power to raise or lower rates as they deemed expedient or necessary. What is there in the present record inconsistent with such an illustration, that is not entirely covered by the quotation from the Home Telephone Co. case above referred to?

Appellant says such a contract binds the utility company as to rates and does not bind the city. This contention is not tenable. Both the utility company and the city, the tax payers, gas consumers, and patrons of the gas company, and all other privies to the franchise contract are absolutely bound by the rates named therein until such time as the "city council" shall deem it expedient or necessary to either raise or lower rates. And if rates are then either raised or lowered in such manner as to deprive either of the parties or their privies of their property without just compensation, then either party will be protected by the courts against any such unjust legislative action.

But, as said in the Tipton case, 176 Iowa, on page 239:

> "A distinction must be kept in mind between the power to regulate rates and the power to contract as to rates."

And again in the Manitowoc case, 140 Am. St. Rep. on page 1065:

> "The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer."

And again in the same case on pages 1066 and 1067:

> "It is contended that this law has superseded the contract involved in this suit, and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the railroad commission the power to determine the fact as to whether or not a given rate was reasonable. When that determination was reached the law became operative upon the particular rate called into question, and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by law. The railroad commission has made no determination in the case before us; at least if it has, it is no part of the record. Until that determination is made the contract is in force. When it is made the contract is superseded, **if the rate is changed.** * * * * * Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be

that adequate service cannot be given at the rate fixed or that conditions have so changed that the road cannot be operated unless rates are increased and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. If, as contended by counsel for the respondent, no contract was entered into and we were dealing with the ordinance as a legislative enactment pure and simple, and not as a part and parcel of a contract, there might be good reason for the claim that it is superseded by chapter 362, Laws of 1905, without any affirmative action on the part of the railroad commission. But such is not the case before us."

The statute in question, Section 725, assumes the existence of a rate already in effect. The statute providing for, and for the retention of, **power to** "regulate and fix" rates. Unless there is a rate in existence there would be nothing to **regulate and fix.**

This is well pointed out in Omaha Water Co. vs. City of Omaha, 147 Fed. 1, in this language:

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes

of the nature of a governmental power and also of that of a business power. Are the inhabitants of the city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate."

Let us reverse positions with appellant. Suppose, for example, some of the consumers of gas had made application to the city council of Fairfield for a reduction of rates, instead of the Iowa Electric Company making application for a raise. And suppose the city council had declined to change the rate existing under the franchise agreement. Would appellant then contend that such consumers of gas would have the right to reduce their own rates, and secure an injunction from the Federal courts to compel the utility company to furnish gas at a less rate than is provided by such franchise ordinance, and prevent such company from collecting a higher rate than the consumers themselves were willing to pay,

upon allegations by such consumers that the cost of production had decreased, and that to take from them the franchise rate would be taking their property without just compensation? To ask this question is answer enough. The company would then very properly say, what we now contend, that the rate fixed in the franchise ordinance should continue until the city council deemed it expedient and proper to change the rate, in the exercise of its legislative discretion, and that it was not for the consumer to determine for himself this question of reasonableness or unreasonableness of such rate.

In City of Woodburn vs. Public Service Commission, 161 Pac. 391, the Supreme Court of Oregon said:

> "The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion. When Woodburn granted the franchise to the Telephone company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state."

Under the Oregon statute the city council did not have the power to regulate rates while in Iowa such power is expressly delegated to the city council.

There is however a distinction between the city council which acts as a legislative body, and the city when acting in a private or business capacity, and this distinction has been recognized in very recent decisions of the Supreme Court of Iowa. See the Tipton case, 176 Iowa, 239.

The Jones Auto case is an illustration of the power to raise rates as well as to lower them, and also points out that rates might be fixed by the **utility company** in the **absence of rates** being fixed by the city council **or of any contract.** See 182 Iowa, page 985.

The foregoing authorities very clearly demonstrate, and appellant would not contend otherwise, that if the State of Iowa had a Utility Commission, or if the State Legislature had still retained the right to regulate rates, that until the affirmative action of such Utility Commission, or of the State Legislature, as the case might be, both the utility company and the city would be bound by the rates fixed in the franchise ordinance.

This being true, then, in order to deprive the city of the power to fix rates in the first instance by agreement in the franchise ordinance, it would have to be done on the ground of incompatibility of interest solely, upon mere inference, and against the natural meaning of the words used in the statute. And such a process of statutory mis-construction has never been recorded in any case, so far as we have been able to ascertain, by a Federal court, under a jurisdictional allegation under the "due

process" or "equal protection" clauses of the Constitution.

The case of Milwaukee Elec. R. & L. Co. vs. Railroad Com., 238 U. S. 174, so much relied upon by appellant, contains the following language:

> "The chief justice in the opinion in the present case regarded the construction of Sec. 1862 as controlled by the previous case of Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925. In that case, the Supreme Court of Wisconsin used the following language, which is quoted with approval by the chief justice in this case:
>
> "'No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting Sec. 1862, Stat. (1898), or Sec. 1863, Stat. (Supp. 1906: Laws of 1901, Chap. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act.'
>
> "The chief justice further pointed out that Sec. 1863, which was in question in the Manitowoc case, was substantially the same as Sec. 1862, involved in the present case; for while Sec. 1863 authorized consent by municipal au-

thorities to the use of streets upon such terms and subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe, it was the same in effect as Sec. 1862, authorizing municipal authorities to grant the use of streets upon such terms as they shall determine, and concluded:

"'We are of the opinion, therefore, that the holding in the Manitowoc case, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made.'"

This Court in that case said:

"In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the city and the company until subsequent legislative action by the state, or to decide whether the grant of the rights and privileges as to fares was, under the Wisconsin Constitution, revocable at the will of the legislature."

The case of Salt Lake City vs. Utah Light & Traction Co., decided by the Supreme Court of Utah May 2, 1918, and reported in 173 Pac. 556, contains a very exhaustive review of the authorities and, on page 561, contains the following language:

"We have no difficulty in reconciling the decisions in those cases. It is now settled law

that so long as the state does not interfere, the rates agreed upon between the cities and the street railway companies in the franchise ordinances are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them."

In Kansas City Bolt & Nut Co. vs. Kansas City Light & Power Co., 204 S. W. 1074, 275 Mo. 529, affirmed by this Court in 254 U. S. ...., 41 Sup. Ct. ...., 65 L. Ed. ...., the Supreme Court of Missouri said:

"While there are some minor proposition discussed in the briefs, there is one main question which will dispose of the case. We shall therefore confine our discussion to the one main question, viz: 'Did the order of the Public Service Commission, fixing the rates which the defendant company could charge for electric energy at Kansas City, Mo., supersede the rates fixed by the contract theretofore existing between the parties?'

"Under the recent holding in the cases of State ex rel City of Sedalia vs. Public Service Commission et al., 204 S. W. 497, and City of Fulton vs. Public Service Commission, 204 S. W. 386, the above question must be answered in the affirmative. In the Sedalia case, supra, it was held by Division 1 that the schedule of reasonable water rates fixed by the Public Service Commission superseded the rates fixed by contract between the municipal corporation and the public service corporation. It was there held: (1) That the power to make

rates for public service arises from the police power of the state; (2) that the instrumentality designated by statute to exercise such rate-making power is the Public Service Commission; (3) that under the provision of Article 12, Section 5, Constitution of Missouri, the police power cannot be abridged by contract; (4) that therefore, when the Public Service Commission fixes a schedule of reasonable rates for public service in conformity with the provisions of the Public Service Commission Act, such rates automatically supersede all contract rates coming in conflict therewith. The above case was cited and approved by court in banc in the Fulton Case, supra. The principle involved in the case at bar is the same as that involved in the two cases cited. No valid reason can be stated why a rate contract entered into between a private manufacturing corporation and a public service corporation (as in the situation here) would not (if permitted to stand), be just as much an abridgment of the rate-making power of the state as would a rate contract between a municipality and such public service corporation (as was the situation held in judgment in the cases above cited)."

In Public Utilities Commission vs. Wichita R. & Light Co., 268 Fed. 37, the Circuit Court of Appeals for the Eight Circuit, in an opinion filed July 15, 1920, said:

"In Kansas City Bolt & Nut Co. vs. Kansas City Light & Power Co., 275 Mo. 529, 204

S. W. 1074, it was held: Rates fixed by contract with a public service company for electricity to be supplied, are superseded by rates fixed by the Public Service Commission, since the police power of the state cannot be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a per curiam opinion upon the authority of Union Dry Goods Co. vs. Georgia Public Service Corporation, 254 U. S. ...., 41 Sup. Ct. . .., 65 L. Ed. ...."

The foregoing authorities show that the courts recognize the validity of contracts as to rates until such rates are **superseded** by other lawful rates established by the legislative body having that power. It will be noted, however, that none of the courts have ever held that prior to such action by such legislative body the utility company can itself establish higher rates than the contract rates. But, on the contrary, all of the courts have said that the contracts rates are subject to the reserved power of rate regulation, and that they remain binding and enforcible until the exercise of such power by State Legislature, City Council, Public Utility Commission, or whatever other body may have been designated to exercise the rate-making function.

It will also be noted that the mere fixing of or agreement for, rates or maximum rates, has never been regarded as any abridgment, or even attempt to abridge, the power to regulate.

To the same effect are Trenton & Mercer County Traction Corporation vs. City of Trenton, 101 Atl. 562. (New Jersey), State ex rel Tacoma R. & P. Co. vs. Washington Public Service Com., 172 Pac. 890, and Sausalito vs. Marin Water & Power Co., P U. R. 1916A, 244.

RESPONSE TO APPELLANT'S ARGUMENT

DIVISION ONE

MUNICIPALITIES HAVE EXPRESS AUTHORITY TO FIX RATES BY CONTRACT.

(a) Appellant concedes in argument that power to contract as to rates was expressly authorized by the Statutes of Iowa prior to the enactment of Chapter 16 of the 22d G. A. (App. Arg. page 46).

It is, however, contended in argument that:

"The effect of Chapter 16 of the 22d G. A. was to take away from cities of the first and second class having over 7000 inhabitants, * * * the power they had theretofore pos-

sessed of contracting as to rates." (App. Arg. page 47).

No attempt is made to explain the language of that act, and in fact no reference is even made to the express provisions of that act, which it is contended "take away" the right theretofore possessed.

That language, however, not only does not sustain appellant's contention, but on the contrary, expressly eliminates such a contention by providing:

> "All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state **in addition to the powers now granted, shall have the further and additional powers conferred by this act.**"

Appellant's argument indicates familiarity with this act, but for self evident reasons makes no mention of these specific words contained in the statute.

None of the cases cited on this proposition by appellant are in point.

There is, however, a well established rule that the language of all ordinance franchises shall be construed most strongly against the utility companies, and if there is any doubtful language used, such doubt shall be determined in favor of the city.

DIVISION TWO

SECTION 725 CONFERS EXPRESS POWERS ON MUNICIPALITIES OVER GAS RATES, BUT DOES NOT THEREBY ELIMINATE ANY OTHER POWERS.

This proposition is settled by the language of the act in question above quoted. This language the Supreme Court of Iowa says was a substantial re-enactment of the provisions of said Chapter 16.

DIVISION THREE

THE LEGISLATIVE HISTORY OF SECTIONS 720 AND 725 DISCLOSES AN EXPRESS INTENT TO **NOT** WITHDRAW OR DENY ANY POWER, BY EXPRESSLY PROVIDING FOR FURTHER AND ADDITIONAL POWERS, IN ADDITION TO THE POWERS NOW GRANTED.

DIVISION FOUR

SECTION 720 OF THE SUPPLEMENT TO THE CODE DOES NOT SPECIFY ANY CONDITIONS AT ALL. IT PROVIDES LIMITS OF TWENTY-FIVE YEARS AND FOR A VOTE OF THE ELECTORS.

Such provisions are not conditions at all, because they preclude the granting of any franchise at all.

We are unable to perceive how a franchise could be said to be granted upon either of **such conditions** for the reason that if either existed there could be no franchise.

DIVISION FIVE

APPELLANT SAYS THE LONG SETTLED CONSTRUCTION OF THE IOWA STATUTES BY THE IOWA SUPREME COURT IS THAT, THEY DO NOT CONFER ANY POWER OR AUTHORITY UPON MUNICIPALITIES TO ENTER INTO CONTRACTS FIXING RATES, BUT TO THE CONTRARY PROHIBIT THE MAKING OF SUCH CONTRACTS.

In support of this contention appellant cites five Iowa cases, all but one of which were decided since Judge Wade's decision in this cause. The other, the Jones Auto case, being the only case previously decided, and which does not support such contention. None of these cases involve the same facts as appear in this case.

DIVISION SIX

THERE ARE NO PREVIOUS HOLDINGS OF THE IOWA SUPREME COURT, CONSTRUING THE IOWA STATUTES IN THE MANNER CONTENDED FOR. BUT, THERE ARE DECISIONS OF THE IOWA SUPREME COURT HOLDING TO THE CONTRARY, AND THERE ARE ALSO DECISIONS OF THE FEDERAL COURTS CONSTRUING SUCH STATUTES.

Des Moines vs. Waterworks Co., 95 Iowa, 348.
Waterworks Company vs. City of Creston, 101 Iowa, 687.
Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 982.
City of Tipton vs. Tipton Light & Heating Co., 176 Iowa, 224.
Cedar Rapids Gas Light Co. vs. Cedar Rapids, 223 U. S. 655.
Muscatine Light Co. vs. Muscatine, 256 Fed. 929.
Smittle vs. Haag, 140 Iowa, 492.
Thompson vs. Mitchell, 133 Iowa, 527.

The case of Raymond vs. Parish of Terrebonne, 28 Fed. 773, confines the rule to the facts as there stated:

> "We are of the opinion that the construction there given (referring to the decision of the state court) of the statute, authorizing the issue of the bonds in suit,—the additional fact having been found by us that the plaintiff **took title after that decision was made public,**—is binding upon this court; the question in that respect being one of local statute, and not of general commercial law. We are also of opinion that the construction is correct, provided the questions were new."

No one could take exception to such an opinion. But it is not applicable to the facts in the case at bar. In this case there was no previous decision of the Iowa Supreme Court supporting appellant's contention, but, on the contrary, there were both State and Federal, and United States Supreme Court decisions recognizing the validity of contracts fixing rates, subject only to the power to regulate and fix other rates as the city council might deem such regulation expedient or necessary. Furthermore, the question now involved is one of general law applicable to all states generally.

The Town of Woodward case was an action by the city to compel specific performance. The defendant was a public utility corporation, one of Mr. Reed's companies, holding a franchise from the town of Woodward. It furnished the service for many years at the rates provided in the ordinance. In 1918, it declared its inability to further furnish such service. It did not seek to retain the benefits of the franchise. The town was asking for an injunction against the utility company to enjoin a breach. There was no evidence of any actual ac-

ceptance of the terms, and no provision in the ordinance, like the case at bar, that the rates should be, after three years from acceptance of the ordinance, such lawful rates as are fixed by the body authorized to establish rates.

The opinion is not a well considered one, was filed after the decision by the Federal District court in the case at bar, and the questions presented in this case were not raised or passed upon.

The writer of the opinion makes this statement:

> "By Chapter 16, Acts 22d G. A., this right of contract by the city council was taken away from cities having a population of 7000, or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change is obvious enough."

This statement is not supported by any authority, and is contrary to the express language of the act in question. It is not a construction of any statute at all, but is a deduction made from what the writer of the opinion evidently thought the law ought to be. It is also directly in conflict with the decision of this Court in the Cedar Rapids Gas case, 223 U. S. 655, and the previous decisions of the Iowa Supreme Court in the Jones Auto case, 182 Iowa, 982, Creston Waterworks case, 101 Iowa, 687, the Tipton case 176 Iowa, 224, Smittle vs. Haag, 140 Iowa, 492, Thompson vs. Mitchell, 133 Iowa, 527, Muscatine Lighting Co. vs. Muscatine, 256 Fed.

929, the Manitowoc case, 140 Am. St. Rep. 1056, the Des Moines Waterworks case, 95 Iowa, 259, and even the distinction drawn in the Selkirk case, 176 N. W. 301.

The Ottumwa Railway and Light case did not involve the same statute, the facts were entirely different, it was decided after the case at bar, and a rehearing has been allowed in that case set for January 14, 1921, when it will be heard by a court of seven consisting of three new judges, the writer of the opinion having been eliminated from the court at the last election.

The Selkirk case was decided since the decision of the case at bar, and although the case at bar was cited on page 302 of the opinion in 176 N. W. the Court distinguished the cases in the following language:

> "In the Muscatine case the Light Company endeavored to change the rate fixed in the ordinance and charge a higher one, without the exercise by the city of its power to regulate and fix rates, and without the consent of the city."

That case was decided after the Town of Williams case, which was also an action by the city for a temporary injunction, in which the court merely decided that the claim was not so unreasonable, or so clearly untenable, that the court should refuse to preserve the status on the theory that the defendant is clearly not entitled to relief on final hearing.

The writer of the opinion in the Selkirk case says:

"Appellant cites and relies on Columbus

Railway, Power & Light Co. vs. City of Columbus (D. C.) 253 Fed. 499.

"Muscatine Light Co. vs. City of Muscatine (D. C.) 256 Fed. 929, and a memorandum and decree in another case not reported. The Columbus case arose under the statutes and law of Ohio, and the decision follows the rule laid down in Ohio, **which seems to be contrary to the general rule**, and is contrary to our own decisions. There is this further fact in that case, that the company was attempting to raise rates without the consent of the city council."

No authorities are cited in support of either proposition, and it is evident that the court was not fully advised either as to the general rule or the previous decisions in Iowa.

The Columbus case had then been affirmed by this Court, having been decided April 14, 1919, and reported in 39 Sup. Ct. Rep. 349. The opinion in the Selkirk case was filed Feb. 16, 1920, but no reference was made in that opinion to the decision of this Court in the Columbus case.

DIVISION SEVEN

The case of Knoxville Gas Co. vs. Knoxville, (C. C. A.) 261 Fed. 283, is not applicable to the facts in the case at bar for the following reasons:

1. The Court, in the first paragraph of the opinion says:

"The controlling question is whether in 1903 the city of Knoxville possessed the power by contract irrevocably to fix the maximum

price of gas for a term of fifty years. The decision was based on the Statutes of Tennessee and the Court held that authority had not been given by the state legislature authorizing the city of Knoxville to make such a contract."

2. The Court also said:

"Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to agree upon a price for gas supplied throughout the life of the ordinances of 1903, must at last rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price. The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact."

In the case at bar both counsel for appellant, and the latest dictum of the Iowa Supreme Court in the Town of Woodward case, so much relied on by appellant, concede that the power to fix rates expressly existed, and their contention is that Chapter 16 of the 22d G. A. took away that power.

In the Home Telephone Co. vs. Los Angeles, 211 U. S. 265, 29 Sup. Ct. Rep. 50, the facts were entirely different from those in the case at bar.

The franchise was granted by an ordinance for fifty years, which is to be enjoyed in accordance with terms and conditions named, stipulates for cer-

tain free service for the city, and the payment to it, after five years, of 2 per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts.

This ordinance reserved to the city council the power, by ordinance, to regulate, and fix and determine the price of gas, telephones, etc., provided by the Statute of California.

The Court said:

> "This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, **unalterably**, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter powers of regulations?"

In that case the city council had, subsequent to the franchise ordinance, enacted an ordinance reducing the rates fixed in the franchise ordinance. It was this reduction in the price or rates of telephone service that appellant, the Telephone company, claimed impaired the original contract contained in the franchise ordinance. This Court sustained the lower court in holding that there was no impairment of any contract right of the Telephone company. This language was used:

> "The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract is fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore denied."

The decision sustained the contention of the city that it had power to regulate rates, and does not in any manner conflict with our contention in the case at bar. It is also in perfect harmony with the decision of this Court in the Cedar Rapids Gas case, which involved the very statute now being questioned, and in which this Court, since that decision, said:

> "It is true that the contract was in the form of an ordinance, but the ordinance was drawn as a contract, to be accepted, and it was accepted by the plaintiff; it contained reciprocal undertakings, the one in question being that of the plaintiff, as we have said; and it was subject to the power retained by the city to regulate rates."

This Court, in the Home Telephone case did not find it necessary to determine whether or not it was intended in the franchise ordinance to fix the rates in such a manner that they could not be afterwards readjusted by the city council in its legislative capacity to regulate rates, and did not decide that question. There are no adjudicated cases, so far as

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we have been able to find, holding that language used by the grantee of the franchise, agreeing to furnish service at rates specified for a specified period, subject to the power retained by the city council, can be construed as prohibiting the exercise of such power of regulation.

There are cases to the contrary, however.

See Waterworks Co. vs. City of Creston, 101 Iowa, on page 689, wherein the Supreme Court of Iowa, said:

> "Appellant's next contention is that the contract is void, in that it attempts to exclude future regulation." * * * * *
>
> "The ordinance grants to appellee the right to charge and collect, during the continuance of the privilege, from consumers, the rates specified, 'or other rates that may be established by the grantee and approved by said council.' By this ordinance the city council established the rates therein specified, and have not since established any other or different rates. * * * It is insisted that because of the provision in the contract as to rates, the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain the contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has. Surely, every equitable consideration is against such a result. What we have said disposes of

appellant's contention that the rates, being for twenty-five years, are unreasonable."

To the same effect is Ft. Smith Light & Traction Co. vs. City of Ft. Smith, 202 Fed. 581, and Knoxville Water Co. vs. Knoxville, 189 U. S. 434. Also see Iowa Railway & Light Co. vs. Jones Auto Company, 182 Iowa, on page 990, wherein the Supreme Court of Iowa, said:

> "And the rates for service therein specified are subject to subsequent adjustment as this may be deemed expedient or necessary by the city council."

The case of San Antonio Public Service Co, vs. City of San Antonio, 257 Fed. 467, is not in conflict with these cases, but contains this very pertinent statement:

> "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences slight in themselves may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of Freeport Water Co. vs. Freeport City, supra, Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702, and Knoxville Water Co. vs. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, where no authorized contract was found, as contrasted with Detroit vs. Detroit Citizens' St. Ry. Co. supra, and Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48

L. Ed. 1102, where a contrary conclusion was reached."

DIVISION EIGHT

We have no quarrel with appellant in regard to the law contended for in its Division Eight proposition.

We concede that the exercise of the power conferred by Section 725 is legislative exercise, and that it is continuous so that one city council may not bind itself or any succeeding council from exercising such power.

But, we fail to see any room for the application of such doctrine to any of appellant's contentions in this case.

In the first place, being legislative, the exercise of such power of the city council to regulate rates is not subject to control by the courts.

In the next pace no attempt has been made by the city council to either bind itself, or any other council, for any definite length of time, but the utility company has bound itself, as one of the conditions upon which it received and claims the right to still exercise the privileges of the franchise, that the rates specified shall continue for three years, subject to the power of the city council to re-adjust such rates when it may deem such re-adjustment expedient or necessary.

We do, however, in this connection, wish to suggest that, if there could, by any manner of contortion of the language used in the franchise, be deducted any doubt on the question of whether or not the city intended to exclude the future exercise of the power to regulate, such language should be

construed most strongly in favor of the city and against the utility company. See:

People vs. Detroit United Ry., 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582.

Township of West Bloomfield vs. Detroit U. Ry., 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258.

Peterson vs. Tacoma Railway & Power Co., 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.

McQuillan on Municipal Ordinances, Sec. 578.

9 Cyc. 588.

Des Moines Waterworks Co. vs. Des Moines, 95 Iowa, 348, 64 N. W. 269.

St. etc. R. Co. vs. Houck, 120 Mo. App. 634, 97 S. W. 963.

Illinois Cent. R. Co. vs. Chicago, 176 U. S. 646, 20 Sup. Ct. Rep. 509, 44 L. Ed. 622.

In the Peterson case, 140, Am. St. Rep. reading from page 941, we find this statement:

> "It will be seen under this authority that, if we found the contract to be doubtful, it would be our duty to resolve it in favor of the city, for franchises are to be construed in favor of the public, unless controlled by law or saving clauses of the contract."

We also find in 13 Corpus Juris on page 539, this statement:

"Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid and the other of which will destroy it or render it invalid, the former will be adopted so as to uphold the contract. So a contract should be construed in favor of mutuality and of certainty.

"507 b. Construction as Legal rather than Illegal.

"So where one construction will make the contract legal and another will make it contrary to law or public policy, the former construction will be adopted, if reasonable; but in order to uphold the validity of the contract, the court cannot do violence to the plain meaning of the words."

See also:

U. S. vs. Central Pac. R. Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173.

Hobbs vs. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

Cole vs. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161.

DIVISION NINE

We do not agree with the statement that "Neither the defendant city or the plaintiff company was bound by the rates for the three-year term." We claim that each was bound by such

rates, subject to the power of the city council to re-adjust them at any time such body might deem such re-adjustment expedient or necessary.

DIVISION TEN

There is no want of mutuality, even if we base the decision strictly on contract, and waive, for the purpose of argument, the condition upon which the grant was made proposition.

In the Iowa Railway & Light Co. vs. Jones Auto Co. case, cited by appellant, we find nothing to support the contention of lack of mutuality, but quite on the contrary we find this statement:

> "The authority to regulate and fix rates of compensation is not limited to reducing these. It includes the power to increase as well, and the city council may decrease or increase as may be necessary in determining those that shall be just and reasonable. Nor is it essential that change of rates by the city council shall rest upon some additional consideration. It is enough that the law has empowered that body to regulate and fix rates to be exacted, and the conditions of the franchise, with such authority reserved, are sufficient consideration, if any were necessary. At the time Ordinance 98 was enacted, Section 720 of the Code contained no provision for the amendment of the franchise, and counsel for appellant contend on that ground that it is invalid. But a re-adjustment of rates of compensation in no manner involves an amendment of the charter of the company, for that, as seen, through the

statute, which must be read into the ordinance, granting the franchise authorizes the regulation and fixing of such rates by the city council at any time. It is one of the things the franchise authorizes to be done thereunder, and in so doing, the franchise is not amended, but its terms carried out. The method of regulation and fixing rates is not prescribed, and this being so, it was competent for the city council to exercise in its own way the power conferred."

Another citation of appellant, 13 Corpus Juris, 332, is contrary to its contention, as follows:

"And, conversely, a contract is not unilateral where it contains mutual obligations binding on both parties. Mutuality does not require that both engagements must be expressed in the same form, for one may be in writing and the other by parol. The benefits or liabilities of the parties need not be equal. It is sufficient that a consideration move to both parties, and mutual promises are not essential where a sufficient consideration is otherwise present. Where there are mutual promises between the parties, it is not necessary to render a particular promise by one party binding that there be a special promise on the part of the other party directed to that particular obligation."

DIVISION ELEVEN

Appellant's contention under this division, as we read the decisions, is not sustained by the authorities cited.

Or, in other words, the authorities cited are not applicable to the facts in this case, and hence do not sustain its contention.

In the Chariton Telephone case, first cited, 173 Iowa, 497, the holding of the court was that the telephone company was not estopped from claiming its rights under the state law from the mere fact that it had secured the passage and had accepted a franchise ordinance when the city had no power to enact the ordinance in question. The ordinance was held absolutely void and no rights were claimed under it by the telephone company. That company claimed only its rights under the state law regardless of the void ordinance. In the case at bar the gas company has no rights under the state law independent of the ordinance. Without the franchise ordinance it has no right to use the streets of the city. Hence, it seeks to retain the benefits of the ordinance and repudiate the conditions.

To the same effect is Chamberlain vs. Iowa Tel. Co., 119 Iowa, 619.

In that case it was held that a telephone company could occupy the streets, prior to 1897, without any express grant of that right by the municipality.

Doyle vs. Wilcockson, 184 Iowa, merely re-affirms the same proposition.

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 241, not only does not support appellant's contentions, but is squarely against them.

In that case the City of Cedar Rapids granted the water company an exclusive franchise for twenty-five years, with equal right thereafter with others, of furnishing the city with water supply. This grant was made on February 19, 1875.

On June 8, 1900, the city council passed an ordinance fixing a schedule of rates.

After the passage of the ordinance of June 8, 1900, the water company commenced an action in equity to restrain the enforcement of this ordinance fixing rates. It alleging that the rates so fixed are not compensatory, and are wholly insufficient to pay necessary expenses and charges and return any adequate or reasonable profit upon the investment made in the works, and that said ordinance is therefore unreasonable, and has the direct effect to deprive plaintiff of its property without due process of law, and to deny to plaintiff the equal protection of the law, in violation of the fourteenth amendment to the Constitution of the United States.

The District court sustained these contentions and entered a decree as prayed, but this decree was reversed by the Supreme court.

Justice Weaver, in the opinion of the Supreme court, said:

> "Under the ordinance of 1875 the plaintiff obtained a privilege which may properly be called a 'franchise,' in the common acceptance of that term; that is, the right or privilege of supplying the city of Cedar Rapids and its inhabitants with water, and of occupying the streets of the city for that purpose. It must be said, however, that plaintiff's privilege of supplying the city with water is not, in the strict sense of the word, a 'corporate franchise;' that is, it is not a privilege derived from or obtained by the act of incorporation. Its charter rights and privileges are such only as come to it through its organization under the general

corporation law, and did not and could not include the right to furnish water to the defendant city. Such right could only be acquired after the incorporation was accomplished, and by the agreement and consent of the city. True, the grant of corporate capacity was from the state, and the subsequent grant from the city may be said theoretically to have been also from the state. But the city was under no legal obligation to make the grant, and might have refused it without in any manner affecting the plaintiff's corporate rights, powers, or franchises. By making the grant it gave the plaintiff what may be called an 'additional franchise or privilege.' See Bridge Co. vs. Prange, 35 Mich. 400 (24 Am. Rep. 585). And like other franchises, it constituted a contract between the parties, having in general the same incidents and subject to the same interpretation which would obtain between other contracting parties."

Later in the same opinion we find this statement:

"But it is to be remembered that the grant of the franchise and its acceptance constitute a contract between the parties, and we think it has never been held that contract rights and obligations thus arising may not be considered and adjudicated by the courts in the same manner and by the same proceedings which obtain between litigants in general. * * * The corporation is the moving party, and comes into court asserting that by reason of the contract

with the city, as indicated by the grant of 1875, it has the right to furnish the city water supply upon certain terms, and, alleging that such right has been violated by a certain ordinance regulating its schedule of rates, it asks that the enforcement of such ordinance be enjoined. Such being the case, there is no good reason why the other party to the contract may not allege that the grant has expired, and that the contract, as such, has no longer any vital force or effect."

Again in the same opinion we find this statement:

"A person dealing with a municipal corporation is held to know the extent of the power of such corporation, and, if with such knowledge, he obtains a grant for which there is no legal authority, or is in violation of an express statute, he does so at his peril, and obtains no right which is enforceable in the courts. * * * * It follows of necessity from these principles, if not, indeed, as a matter of sound public policy, that a contract or grant made by a municipal corporation without any authority of law, and accepted by the grantee with full knowledge of its unlawful character, cannot be held to give color of right to the privilege thus attempted to be granted. To hold that color of right is to be thus obtained is to enable city officials to ignore with impunity every statutory limitation upon municipal power, and impose upon the people burdens which the law expressly provides shall never be created. The case of State vs. City of Des Moines, 96 Iowa, 521, re-

lied upon by plaintiff as supporting its claim to a colorable franchise, is easily distinguished from the one before us. We there pointed out the same distinction which we here emphasize between a lawful act irregularly accomplished and one for which no authority exists."

And again:

"A different rule sometimes obtains when the power to contract exists, but has been defectively or irregularly executed; but if the authority to do the act or make the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon."

And again:

"Plaintiff entered into a contract having a definite limit, and with knowledge of the city's lawful right to insist that the limit be observed, and if by any mistake of judgment on its own part or by the exercise of any lawful power on part of the city the enterprise has proved unprofitable, it is not a ground for relief at the hands of the court. The fact that the exercise of a lawful power by the city may affect the value of plaintiff's property is also, in itself, immaterial." * * *

"Has the city any power to prescribe or regulate the plaintiff's rates for water service? The statute which authorized the granting of the franchise (Code 1873, Section 473) also provided that the company might be authorized

to charge and collect such rates 'as may be agreed upon between the company and the city.' We do not think, however, that plaintiff's right to collect rates was thereby necessarily left dependent upon an agreement which might never be arrived at. City of Des Moines vs. Des Moines Waterworks Co., 95 Iowa, 348. The effect of the statute is little, if anything, more than a recognition of the right which already existed at common law, — the right to charge and receive reasonable compensation for services performed. In view of the fact that we hold the franchise to have expired at the end of twenty-five years, it is unnecessary to go into any discussion of the power of the city to establish a schedule of maximum rates during the term."

In that case the Court said the illegal part of the contract, that is, that which provided for more than a twenty-five year period was separable from the grant for twenty-five years, if the plaintiff's theory that the words "and an equal right thereafter with all others" were intended as the grant of a franchise beyond the period of twenty-five years.

"We think, however, it is not a violent rendering of the language to construe it simply as an undertaking that the water company shall have an equal opportunity with others in competing for a new franchise when the original exclusive grant for the twenty-five years has expired."

Under this construction there was nothing illegal in the contract. But, however this may be, even under the theory that there was a grant for

more than twenty-five years intended. There could be a separation of the illegal part from the legal part without disturbing the rights of the public.

But, in the case at bar there can be no separating the condition as to rates from the other parts of the contract. If the rate provision is eliminated, then the moving cause upon which the members of the council and the voters at the election consented to the grant would be eliminated. This, as stated by Justice Weaver in the case above referred to, would "impose upon the people burdens which the law expressly provides shall never be created." It would impose upon the people a franchise ordinance giving to the utility company rights and privileges which would never have been conferred but for the condition providing for the rates to be charged, subject to the future exercise by the city council of the right to re-adjust. And, as also said in the same case. "Such right could only be acquired after incorporation was accomplished, and by the agreement and consent of the city." It is fundamental that such consent, obtained upon a false, or illegal promise, cannot be made the basis of any rights or privileges so obtained.

Appellant's contention that the provisions of the ordinance contract are separable is untenable.

In 13 Corpus Juris, 513, we find this statement:

> "If any part of a single consideration for one or more promises is illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which

part or which one of the considerations induced the promise, this rule being enunciated by statute in some jurisdictions."

And on page 515 of the same work we find this statement:

"RENUNCIATION OF ILLEGAL PART. When an entire contract is illegal in part, a recovery cannot be had thereon by a renunciation of the illegal part."

This proposition is made directly applicable to contracts or franchise ordinances, of the character in the case at bar, in the case of Waterworks Co. vs. City of Creston, 101 Iowa, 687, wherein it is said:

"It is insisted that because of the provision in the contract as to rates the contract should be declared void. The contract contemplates that a change may be made in the rates, and the law authorizes it. To sustain this contract is to permit the parties to go on under it, and enjoy just what each has contracted for, while to overthrow it would be to render practically valueless the large investment which appellee has made, and deprive appellant of just what it needs and has."

Furthermore, it is well established that contracts of the character now under consideration are not open to the construction contended for by appellant. They do not purport to limit or abridge the power of the city council to make future regulation.

This proposition is not only established by the case last above referred to from the Iowa Supreme Court, but is well established generally.

In Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 21 Sup. Ct. Rep. 490, this Court said:

> "There is no stipulation that it will be the only instance of regulation; that the power to do so is bartered away; and that the condition which determined and justified it in 1888 would remain standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us in so holding."

Previously in the same opinion we find this statement:

> "A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous language."

In Freeport Water Co. vs. Freeport, 180 U. S. 587, 21 Sup. Ct. Rep. 493, this Court said:

> "Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words, 'as fixed by

ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time."

Again, in the same opinion, we find this statement:

"Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition, therefore, of the privileges granted to plaintiff."

The case of Pioneer Telephone & Telegraph Co. vs. State, 127 Pac. 1073, cited and relied upon by appellant, is not in point.

In that case the matter came before the Supreme Court of Oklahoma on an appeal by the Telephone company from an order of the Corporation Commission imposing a fine for violation of an order of the Commission regarding rates.

The inapplicability of that case to the case at bar is apparent. We do not claim that the Commission, City Council, Legislature, or whatever body happens to be endowed with the power to regulate rates, cannot do so. We claim they can do so. That nothing can hinder them from doing so. That in Iowa the City Council, who happens to be endowed

with that power, can always and at all times re-adjust rates whenever such re-adjustment is by the city council deemed expedient or necessary. That cities cannot contract away this power to re-adjust rates. That the city council in the case at bar did not attempt to do so. That the language used in the contract of the franchise ordinance cannot be construed as such an attempt. That if it could be so construed, it can also be construed consistently with the continued exercise of the power to re-adjust, as said in the Freeport case, and that of the two possible constructions the one permitting the continued exercise of the power must be adopted, according to that decision.

We therefore respectfully submit that the city council, and each and all of the respective defendants, have done nothing to either deprive appellant of any of their property without due process of law, confiscate any of their property, or deprive them of the equal protection of the laws, and that their Bill of Complaint was properly dismissed.

Respectfully submitted,

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X. C. NADY,
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Attorneys for Appellee.

Service of the within Brief and Argument and receipt of copies is acknowledged this.....day of January, 1921.

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Counsel for Appellants.